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# WASHINGTON REPORTS

VOL. 69

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CASES DETERMINED

IN THE

# SUPREME COURT

OF

# WASHINGTON

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JUNE 10, 1912 — AUGUST 24, 1912

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ARTHUR REMINGTON  
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SEATTLE AND SAN FRANCISCO  
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## **OFFICIAL REPORT**

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**JUDGES**  
**OF THE**  
**SUPREME COURT OF WASHINGTON**

**DURING THE PERIOD COVERED IN THIS VOLUME**

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To secure the payment of this note, respondents executed and delivered to appellant the mortgage deed which it now seeks to foreclose. The words of the note which we have italicized were stamped thereon, apparently by the use of a rubber stamp. Prior to the execution of the note, appellant's manager directed Mrs. Barnes' attention to the fact that the total interest for 108 months was only \$1,054, which was less than seven per cent on \$1,700 for nine years. He represented that she was thereby obtaining a loan at a trifle less than seven per cent. When the note was executed, it was read by Mrs. Barnes, but neither of the respondents then understood that any greater rate of interest than seven per cent was charged. Respondents promptly made thirty monthly payments of \$25.50 each. In addition thereto they paid \$1,050 on December 16, 1909, and \$125.50 on February 23, 1910. After these payments had been made, appellant, computing interest at twelve per cent per annum, insisted that \$221.59 with twelve per cent interest thereon from February 20, 1910, still remained unpaid, while respondents, computing interest at seven per cent per annum, contended that \$10 only remained unpaid. Prior to the execution of the note, appellant's manager delivered to respondent Susan J. Barnes an advertising leaflet, in which, in illustration of advantages afforded by this monthly or installment plan of loan, appellant said:

"We invite your attention to the following illustration of some of the advantages offered by our monthly installment plan of a loan, as compared with the 'flat' or 'straight' loan. As an example, we will quote the average term of 60 months, or five years, wherein a loan from us of \$1,000 calls for 60 monthly payments of \$22.24 each, making the total amount to be paid within the 5 years, \$1,334.40. (Loans of greater or less amount in the same proportion.) Bear in mind that the sixty monthly payments *cover principal and all charges for interest*, so that when the 60th payment has been made *the entire debt has been paid*, and the mortgage is then released.

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“You will observe that you have repaid the sum  
 borrowed .....\$1,000.00  
 and all interest charges during the 5 years,  
 amounting to ..... 334.40

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making the *total actual cost to you for principal and interest*.....\$1,334.40

“Please note that the total interest charges, \$334.40, make an average of \$66.88 per annum for the 5 years, hence *our loan actually costs you less for interest* than a ‘flat’ loan for the five years at *six and three-quarters per cent* interest per annum, for which you would pay \$76.50 each year, amounting to \$387.50 for the five years. Therefore, any sum that you pay for interest on a flat loan, in excess of six and three-quarters per cent per annum, would be saved to you by borrowing from us.”

We have italicized this excerpt where black-faced type or italics are used in the original. The evident purpose of this leaflet was to convince proposed borrowers that the rate of interest charged was slightly less than seven per cent per annum. The note, although drawn with much detail, studiously avoids any express statement relative to the annual rate of interest. The total principal is mentioned as \$1,700, the total interest at \$1,054, and the 108 monthly payments as \$25.50 each. A careful study of the note discloses the fact to be that the stipulated installments, made monthly, decreased the unpaid principal. These monthly payments were to continue without variation for nine years. It is therefore apparent that the respondents would not have the use of the entire \$1,700 loan for all of that period, but that, as the principal constantly decreased, they were paying more than seven per cent for money actually held and used by them. Considerable intelligence and business capacity is required to understand the import and effect of the note, or to compute its exact rate of interest. The evidence convinces us that respondents did not understand the note; that they relied upon the representation of appellant’s manager that they were to pay seven per cent only; that the manager knew

they were misled, and that he made no effort to enlighten them. Appellant knew the rate charged was nearly twelve per cent, and could have so stated in its note and mortgage had it intended that its customers should not be misled. The evidence sustains respondents' contention to the effect that appellant fraudulently led them to believe they were to pay seven per cent only, and that the note had been drawn on that basis. The note, in so far as it stipulated any additional interest, was without consideration. Appellant's manager, when asked why he did not tell Mrs. Barnes the payments were computed at twelve per cent, testified: "It was not necessary. The rate was mentioned in the mortgage." The defeasance clause of the mortgage is the only one in which twelve per cent or any other rate of interest is mentioned. It in part reads as follows:

"Time shall be material and of the essence hereof, and if default be made in the payment of any of the sums stipulated in said agreement after the same or any part thereof shall become due, or in the procuring of the insurance as hereinafter specified, or in the payment of the taxes or assessments upon any part of said property, or in any condition or covenant in this mortgage set out, then and in either of such cases the whole sum loaned (first deducting all sums paid in monthly installments on the principal, said credits being ascertained by deducting from the monthly installments paid in accordance with the obligation secured by this mortgage, interest at the rate of twelve per cent per annum payable monthly on balances of unpaid principal), as well as the accrued interest provided in said agreement and secured by this mortgage, shall, at the election of the party of the second part, its successors or assigns, without notice, become immediately due and payable, together with attorney's fees in such sum as the court may adjudge reasonable upon the sums which shall then be due, . . ."

Mrs. Barnes understood the rate therein mentioned to be penalty interest, which she would have to pay only in the event of a default.

Appellant, citing *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117, and *Hubenthal v. Spokane & Inland R. Co.*, 43

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Wash. 677, 86 Pac. 955, contends that respondents had an opportunity to read the note and mortgage; that Mrs. Barnes did read them; that they must or could have understood them; that they are now in no position to plead misrepresentation, fraud or mistake, and that they are bound by their terms. The cases cited are not pertinent to the facts proven. It is true that respondents each had an opportunity to read the note and mortgage, and that Mrs. Barnes did read them; but they were so ingeniously drawn that they served to deceive and mislead rather than enlighten respondents as to their actual meaning and import. The fact that Mrs. Barnes did read them, coupled with the statement of the manager that appellant was making the loan at seven per cent, deceived them as to the terms of the contract. The holding of this court in *Lilienthal v. Herren*, 42 Wash. 209, 84 Pac. 829, should be applied to the facts of this case. We there said:

“It is true that the respondent could read, and that the written contract was handed to him with the request that he read it, and he did glance over it hurriedly and without reading it carefully; but he testified that he was well acquainted with the agents of appellants, that he had worked for them, and he relied upon them, and that he asked them if the contract was in accordance with his memorandum agreement and was assured that it was, and he thereupon signed it relying solely upon the statement of appellants’ agents that the contract was all right. The contract is long and involved. It covers five pages of typewritten matter, and it is doubtful if any person not accustomed to legal documents would fully comprehend its meaning without very careful study.”

It is shown that respondents failed to comprehend the legal effect of the intricate and involved expressions which the note and mortgage contain. Any express statements that might have warned them of a higher rate than seven per cent were studiously avoided, and they were informed by the manager that the rate was only seven per cent, a statement they believed and acted upon. Had they understood the facts,

they would not have executed the note. They cannot now be estopped from making the defense which they interpose.

The trial court properly held the loan had been paid. The judgment directing the release of the mortgage and for \$25 statutory damages awarded under § 8799, Rem. & Bal. Code, should be affirmed. It is so ordered.

DUNBAR, C. J., PARKER, CHADWICK, and GOSE, JJ., concur.

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[No. 9948. Department Two. June 10, 1912.]

GOLDIE V. BRYDGES, *by her Guardian etc., Appellant*, v.  
EDWARD F. CUNNINGHAM, *Respondent*.<sup>1</sup>

PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE—SUFFICIENCY. In an action for malpractice in failing to properly diagnose a case and treating an injury to the sciatic nerve of a child as typhoid fever, a judgment of dismissal, notwithstanding a verdict for the plaintiff, is proper, where it appears from all the evidence that there was no injury to the sciatic nerve but that the child was suffering from infantile paralysis, which was incurable, that the treatment for typhoid fever did not contribute to the present condition of the child, and that the defendant, as a man of ordinary skill in the medical profession, could at first have diagnosed the case as typhoid fever, multiple neuritis, or infantile paralysis.

TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT. Where there is no evidence upon which the jury could rest a verdict, and there is nothing to submit to the jury, it is the duty of the court to so hold.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 20, 1911, in favor of the defendant, notwithstanding the verdict of a jury in favor of the plaintiff, in an action for malpractice. Affirmed.

*Jay C. Allen*, for appellant.

*Kerr & McCord* and *J. N. Hamill*, for respondent.

MORRIS, J.—Appeal from an order granting judgment *non obstante veredicto*. Respondent is a physician, and the

<sup>1</sup>Reported in 124 Pac. 131.

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action was one for malpractice in the treatment of the minor plaintiff, a little girl seven years of age at the time complained of. It is the contention of appellant that the little girl is suffering from an injury to the sciatic nerve, resulting in permanent paralysis of her right hip and leg, due to a fall from a porch, and that the respondent improperly and negligently failed to apply the proper treatment, treating the case as typhoid fever instead of making an examination of the injured parts, ascertaining the true condition, and relieving the pressure on the nerve by an operation. Respondent contends that the child is, and from the beginning has been, afflicted with infantile paralysis, for which there is no known cure.

The history of the case shows that the child fell from the porch Thursday evening, and complained of pain in her hip and leg, which her mother sought to alleviate by applying liniment, which seemed to relieve the pain. Friday and Saturday, the child played around as usual, making no complaint, and was apparently fully recovered from the fall. Sunday morning she was still apparently well, and went to Sunday school, from which she returned complaining of pain. When asked to locate the pain she replied: "I have hurts all around me." She was put to bed and her mother treated her all day with hot cloths wrung out in turpentine. In the evening, respondent was called in, and at first diagnosed the case as appendicitis and advised an operation. This was objected to by the family, and Monday afternoon another physician was called in consultation with respondent. It was then decided that no operation was necessary, and that the trouble was typhoid fever, for which she was treated for about twenty-one days. During respondent's visits, when his attention was called to the cold and swollen condition of the hip and leg, he gave it as his opinion that the condition would pass away with the fever, and that nature should be left to take its course. Appellant's theory of negligence depends upon the testimony of several physicians who were

called as experts, to whom a number of hypothetical questions were propounded, tending to sustain the contention that the child was suffering from an injury to the sciatic nerve caused by the fall on Thursday night. These questions, however, did not include the condition of the child on Friday and Saturday, when she was playing around as usual and making no complaint. Each of these physicians, when interrogated by questions including the condition on Friday and Saturday, replied that the history of the case during those two days would exclude any injury to the sciatic nerve, and that the child could not have gone from Friday morning until her return from Sunday school on Sunday morning without complaint in case of an injury to the sciatic nerve, or even a partial dislocation of the injured parts. It is apparent, therefore, from the testimony, which was evidently the reason why the court below granted its judgment, that there is no evidence in the case to substantiate appellant's theory of an injury to the sciatic nerve on Thursday night, since all the testimony, that on the part of appellant as well as that for respondent, excludes this theory, taking into consideration the history of the case from Thursday night to Sunday when respondent was placed in charge.

It needs no argument to show there could be no recovery against respondent unless, as a medical man of ordinary skill, he should have correctly diagnosed the case as an injury to the sciatic nerve and was negligent in his treatment. If, then, there is no evidence that there was such an injury, when all the facts upon which the diagnosis must be predicated are included, but rather the evidence without exception excludes such an injury, there was nothing to submit to the jury. If respondent could be held liable because he did not make a proper diagnosis of the case on his now theory that the child was suffering from infantile paralysis, then the court was in error. But in an action for malpractice, a physician cannot be held for an error in judgment as to the disease his patient is suffering from, since all that any physician



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can give to any case is his best judgment; and if he exercise that judgment as a man of ordinary skill would exercise it, there can be no recovery. The testimony of the physicians called by appellant is to the effect that the symptoms present in this case from Thursday night to Sunday morning might be diagnosed by men of ordinary skill in the medical profession as typhoid fever, multiple neuritis, or infantile paralysis, and that the treatment given by respondent in no way contributed to the present condition of the child. There is, therefore, no evidence in the case that the treatment by respondent was negligent or unskillful. The most that can be said is that he did not discover the infantile paralysis. From the evidence, he could not have cured it if he had. It cannot, therefore, be said that his failure to discover its presence or his subsequent treatment is responsible for the child's present condition.

Appellant strenuously insists the question, being one of fact, was for the jury. Because the issue was one of fact, does not mean the jury are the sole judges of that issue. There must first be a fact in evidence upon which they can rest a verdict. Until that fact appears, there is nothing to submit to the jury, and when the court is impressed with the fact that there is no fact upon which the verdict can rest, it is its duty to so hold. Before there could be any such fact in this case, it must appear that the respondent was negligent in his treatment of the case, and that his negligence caused or contributed to the disease from which the child now suffers. The law on all points we have discussed is so well established no citation of authority is necessary to support it.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, MOUNT, and ELLIS, JJ.,  
concur.

GOSSE, J.—This action was commenced to recover damages for personal injuries, suffered by the plaintiff in consequence of the alleged negligence of the defendants. There was a verdict in his favor, which the court reduced in entering the judgment. Each of the parties has appealed.

The negligence charged is that the defendants own a right of way, roadbed, and railway, within the city of Spokane; that the roadbed where the accident happened is in a deep cut which is spanned by an overhead bridge; that the franchise granted by the city permitting the construction of the railway required the erection of an overhead crossing at the place of the accident; that the crossing was negligently constructed in that it was made of wood with a wooden floor, with spaces between the floor planks; that, by reason of the negligent construction, smoke and steam from a passing train, operated by the defendants jointly, passed through the open spaces of the bridge upon which the plaintiff was driving a team attached to a heavy wagon; that the train was running at a speed of fifty miles an hour; that no bell was rung, no whistle sounded, and no other warning given; that, by reason of the cut and the contour of the ground at the approach to the bridge, the plaintiff could not see or hear the train until he was upon the bridge; that the smoke and steam from the engine passed through the cracks immediately under the horses, and frightened them so that they ran away and threw the plaintiff from the wagon; that the wagon passed over the plaintiff, and that he sustained severe and permanent injuries.

The defendants answered separately, denying the charges of negligence. The defendant Great Northern Railway Company admits that it owns the right of way and roadbed where the plaintiff was injured. Each of the defendants pleaded affirmatively that the plaintiff's injuries resulted in consequence of his own negligence.

The city of Spokane, prior to the accident, granted a franchise to the Great Northern Railway Company, which

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provides that it shall, "at its sole cost and expense, build and forever maintain a suitable highway bridge over its tracks."

In addition to the general verdict, the jury, in response to special interrogatories, answered that no bell was rung and no whistle sounded, that the team was not frightened by the noise of the train, and that the plaintiff could have seen the approaching train when he was approximately fifty feet from a point on the bridge directly over the railway track. Each of the defendants interposed timely motions for a nonsuit and a directed verdict. After the return of the verdict, the defendant the Great Northern Railway Company filed its motion for a new trial, and the defendant the Spokane, Portland & Seattle Railway Company filed an alternative motion for a judgment *non obstante*, and in event the motion was denied, for a new trial. The denial of these motions constitutes the first and principal error assigned. It is not disputed that the defendant the Spokane, Portland & Seattle Railway Company operated the train that passed under the bridge at the time the boy received his injury.

The defendant the Great Northern Railway Company contends that there is no evidence that it constructed the bridge. It suffices to say that it admits its ownership of the track and roadbed, and that it accepted the franchise which required it to construct and forever maintain a suitable highway bridge over its track. This made a *prima facie* case, and it offered no evidence tending to show that it did not construct the bridge. Moreover, if it had done so, the franchise puts the duty upon it of forever maintaining a suitable bridge.

It contends, further, that the cracks in the bridge were the natural result of the shrinkage of the planks in the floor, that the bridge was constructed in the usual way, and that the presence of the cracks under these circumstances does not raise a presumption of negligence. In support of this

view it cites *Kelsey v. New York, N. H. & H. R. Co.*, 181 Mass. 64, 63 N. E. 8. The vice of the contention is that it misinterprets the evidence. One of defendants' witnesses, Mr. Usted, a carpenter, testified that the usual and ordinary method of constructing such a bridge is to lay a double floor, laying the first floor diagonally with the bridge and laying the second floor at right angles with it, thus breaking the joints. The bridge had a single floor with cracks from one-half to one and one-half inches in width. In the *Kelsey* case it was alleged that the parties met their death in consequence of two acts of negligence upon the part of the defendant; (1) negligence in sounding the whistle of the engine under the bridge upon which the parties were driving, and (2) that the bridge was defective and that the horse was frightened by steam from the whistle and smokestack coming up through the cracks in the floor of the bridge. After observing that steam came through the cracks of the bridge and that the cracks were slight and such as might be expected to exist in an open bridge with a plank floor, and that the planks would alternately swell and shrink with the varying conditions of the weather, the court said, in denying relief, that, "There was no testimony in the case to show that the bridge was not built in exact accord with the orders of the county commissioners." As we have observed, in this case there is testimony to show that the bridge was not suitably built and maintained. If the negligent construction and maintenance of the bridge was a contributing cause of the injury, the Great Northern Railway Company is liable. *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143; *White v. Ballard*, 19 Wash. 284, 53 Pac. 159; *Helbig v. Grays Harbor Elec. Co.*, 37 Wash. 130, 79 Pac. 612; *Selby v. Vancouver Water Works Co.*, 32 Wash. 522, 73 Pac. 504; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122.

This defendant further contends that the verdict rests upon speculation, and that the horses may have been fright-

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ened in any one of three ways: (1) by the noise of the approaching train; (2) by the smoke and steam which came up the sides of the bridge; and (3) by the smoke or steam which came up through the cracks of the bridge. The jury eliminated the first reason suggested, and there was practically no testimony to support it. In considering the next two propositions, it suffices to say that the jury was warranted in finding what every horseman knows, viz., that a vehicle traveling at an excessive rate of speed may cause a gentle and tractable horse to take fright, and that the sudden appearance of even ordinary objects under a horse will frighten him when the same object at his side would not do so. The jury was warranted in finding from the evidence that the excessive speed of the train and the smoke under the team were the proximate causes of its fright.

A further consideration of the case as to the alleged negligence of the defendant the Spokane, Portland & Seattle Railway Company requires a brief reference to the testimony. The record discloses that the team was gentle and that the boy was a competent driver; that, owing to the elevation of the ground immediately westerly of the railroad track, the boy could not see the track as he drove upon the bridge, nor until he was approximately fifty feet from a point on the bridge directly over the track, as the jury found; that the bridge, except for about fifty feet immediately above the track, was on a grade; that the boy was driving down an eight per cent grade; that he did not see or hear the train until it was practically at the bridge; that no bell was rung and no whistle sounded; that the train was a passenger train, traveling down grade at forty-five miles per hour; that the top of the smokestack was within five or ten feet of the floor of the bridge; that there were cracks in the bridge from one-half to one and one-half inches in width; that steam and smoke were escaping from the smokestack of the engine; that, as the boy expressed it, there was "smoke on either side of me and between my horses," and that the accident hap-

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pened within the city limits of the city of Spokane, where many people lived, and at a street crossing. The defendants' witnesses testified that the bell was ringing, and that the speed of the train was about twenty-five miles per hour.

A railroad company is not liable for damages resulting from the operation of its train in the usual and ordinary way, but it is liable for injuries flowing from the unusual and negligent operation thereof. 33 Cyc. 937 to 939, and 949 to 951.

"The degree of care required is only what under the circumstances of the particular case is ordinary care; or in other words, such care as an ordinarily prudent person would exercise under like circumstances." 33 Cyc. 950, 951.

The correct rule is tersely stated by Judge Rudkin in *Collier v. Great Northern R. Co.*, 40 Wash. 639, 82 Pac. 935, as follows:

"In cases such as this the liability of a railway company depends upon its control over the agency causing the injury, or the duty it owes to the injured party."

The court, in substance, instructed the jury that, if either of the defendants negligently constructed the bridge and negligently left spaces between the boards in the floor, and by reason thereof smoke or steam came through the floor, frightened the team, and caused the boy to be injured, it was responsible for the consequences thereof. It further instructed:

"You are instructed that, if the defendants or either of them were operating a train upon and over the railroad and roadbed of the defendants or either of them, at Fifth avenue and F streets at or about the hour of seven o'clock a. m., on August 23rd, 1910, that said train was being operated at an excessive and negligent rate of speed, and they or either of them failed to give any warning or signal of the approach of said train, and no bell was rung or whistle sounded, and no warning whatever given of the approach of said train, and the minor plaintiff could not hear the said train and could not see the same by reason of the contour



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of the ground or the place where the said railroad and train were, although he looked and listened for a train before driving upon said bridge immediately over said railroad and before going upon said overhead crossing at the place where the train passes under said bridge, and that steam or smoke was escaping from said engine, and went up and through the cracks of said bridge, and immediately under the horses which the minor plaintiff was driving, and frightened them, and they ran away and threw the minor plaintiff from the wagon in which he was when driving or controlling said team, and that the defendants knew, or by the exercise of ordinary care should have known, that the said bridge was negligently constructed or that the escape of steam or smoke in the operation of a train down grade and at a high rate of speed, without giving any warning of its approach, was dangerous to a person or persons upon said bridge driving a team thereon or thereover, and that the team of plaintiff was a gentle and well-behaved team, then and in that event your finding must be for the minor plaintiff and against the defendant or defendants guilty of such negligence as defined in these instructions."

The giving of these instructions is assigned as error by each of the defendants. The first instruction was clearly right as to the Great Northern Railway Company. Its duty under its franchise to maintain a suitable bridge was a public duty and a continuing one. Elliott, Railroads (2d ed.), § 467. While the instruction may not be happily worded, it in effect stated to the jury that a failure to build and maintain the bridge in the usual and ordinary way was negligence. The quoted instruction was a correct application of the law. The defendants do not contend that it was usual and customary to operate its train at that point—a street crossing and a thickly inhabited part of the city, as shown by the photographs in evidence—at a speed of forty-five miles an hour, without ringing a bell or giving any warning of its approach; but on the contrary, as we have seen, its testimony is that the bell was ringing, and that the speed did not exceed twenty-five miles an hour. The authorities which they cite go no further than to hold that a railway

company is not liable for the consequences of the noise or smoke made by its locomotives on or in the vicinity of public streets, which are usual and incidental to the prudent running of its trains at such places.

We think there is abundant evidence tending to show that the injury resulted from the combined negligence of the defendants.

"If the concurrent negligence of two or more persons combined together results in an injury to a third person he may recover from either or all." 29 Cyc. 487.

It is next argued that the plaintiff was chargeable as a matter of law with contributory negligence. It suffices to repeat that he could not see the train until he was on the bridge and within fifty feet of a point directly over the railroad track. He could then see the track for a half a mile. When he did see the train it was upon him. He testified that, before driving upon the bridge, he listened for the train and did not hear it. Whether he was guilty of negligence was a question for the jury. *Chicago, St. L. & P. R. Co. v. Butler*, 10 Ind. App. 244, 38 N. E. 1; *Ladouceur v. Northern Pac. R. Co.*, 6 Wash. 280, 33 Pac. 556, 1080; *Grant v. Oregon R. & Nav. Co.*, 54 Wash. 678, 103 Pac. 1126, 25 L. R. A. (N. S.) 925; *Averbuch v. Great Northern R. Co.*, 55 Wash. 633, 104 Pac. 1103.

The defendants have interposed separate motions to dismiss the plaintiff's appeal on the ground that the order granting a new trial is not an appealable order. The jury returned a verdict for \$5,213.50. The motions for a new trial were denied on condition that the plaintiff should, within fifteen days, consent to a reduction of the verdict and judgment to \$3,500. He declined to consent to the reduction, and a new trial was granted upon that ground only. The motions are denied. *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360; *Armstrong v. Musser Lumber & Mfg. Co.*, 43 Wash. 584, 86 Pac. 944; *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615.

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The evidence shows that the plaintiff sustained a serious injury. We do not think, however, that the trial court abused its discretion in requiring him to consent to the abatement, or in the alternative to accept a new trial. *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175; *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88. Excessive or inadequate damages is made a ground for granting a new trial by the statute. Rem. & Bal. Code, § 399, subd. 5. As a result of the injury, the end of the right collar bone was detached from the breast bone, and had not united at the time of the trial, eight months later. The attending physician testified that he advised wiring it, but that it was not wired. He was then asked: "Well, is it sure that wiring would be a successful treatment or not?" and answered: "No, it is not sure." There is no other testimony on the question. The plaintiff was seventeen years of age and in good health when he received the injury. He was thirty-one days in the hospital and, at the time of the trial, testified that he was not able to perform hard labor. The trial court saw the boy and was of the opinion that the damages awarded by the jury were excessive. The statute puts the burden upon it in such case of passing upon this question, and this court will not disturb its judgment except where there has been a clear abuse of discretion. We cannot say that it has been so in this case.

The judgment will be modified so as to permit the plaintiff to accept a judgment for \$3,500 within fifteen days after the filing of the remittitur in the lower court. Otherwise the order granting a new trial will be affirmed. Neither party will recover costs upon appeal.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ.,  
concur.

[No. 10299. Department Two. June 13, 1912.]

ED. DOLAN, JUNIOR, *Respondent*, v. SLADE LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

**MASTER AND SERVANT—SAFE APPLIANCE—EVIDENCE—SUFFICIENCY.** The fact that a resaw started automatically is insufficient to establish negligence in not providing proper tension for a belt connecting the machine with the power, where the plaintiff offered no evidence on the subject and defendant's witnesses testified that the belt was kept at all times in such a tension that it would not start the machine automatically.

**SAME—GUARDING MACHINERY—QUESTION FOR JURY.** Whether the gears of a resaw should have been guarded under the factory act, requiring the guarding of all gearing with which employees are liable to come in contact, is for the jury, where it appears that they could have been advantageously guarded, and that the operator was liable to come in contact with the gears whenever it became necessary to adjust the rolls, although the operator was expected to stop the machine before adjusting the rolls.

**SAME — OPERATION OF MACHINERY — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.** It is for the jury to say whether it was contributory negligence for an operator to attempt to adjust the rolls of a resaw without stopping the machine, the thumbscrew being near the gears, although defendant's witnesses testified that he was expected to do so.

**SAME—ASSUMPTION OF RISKS.** The operator of a resaw does not assume the risk from the automatic starting of the machine from the fact that he knew that it had once before so started and failed to notify the employer thereof, since the employer may have had other notice.

**MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—ISSUES AND PROOF—INSTRUCTIONS.** In an action for injuries caused by the automatic starting of a resaw, through the alleged improper tension of the power belt by reason of too great a weight thereon, it is error to admit evidence that a belt-shifter would have been a safer device for starting the machine than a weight on the belt to increase its tension, and to instruct that the lack of a belt-shifter can be considered by the jury only in determining whether the belt was kept at proper tension; since the question whether a belt-shifter would have been safer can have no bearing on the question of the tension on the belt.

<sup>1</sup>Reported in 124 Pac. 133.

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Appeal from a judgment of the superior court for Chelalis county, Sheeks, J., entered October 10, 1911, upon the verdict of a jury rendered in favor of the plaintiff for injuries sustained by the operator of a resaw in a mill. Reversed.

*Bridges & Bruener*, for appellant.

*A. M. Abel* and *W. H. Abel*, for respondent.

FULLERTON, J.—The respondent was injured while in the employment of the appellant, and brought this action to recover therefor. He prevailed in the court below, and this appeal is from the judgment entered in his favor.

The injury occurred while the respondent was working in the mill of the appellant on a machine known as a Berlin resaw. The machine was a stock machine of standard make, similar machines being in common use in sawmills throughout the country generally. The mechanism by which the machine was connected with the power or drive shaft of the mill is not made clear in the record, but it can be gathered that the connection was made by a belt which at its natural tension did not cause sufficient friction on the pulley connected with the machine to put the machine in motion, but put it in motion only when the tension of the belt was increased. The contrivance for increasing the tension was a weight, which was controlled by a rope the end of which was fastened near the stand of the person operating the machine. On the day of the accident, the respondent started the machine to cut certain boards to a bevel angle. He discovered after the work started that the guide rolls which fed the boards into the saw did not have the proper angle, and he stopped the machine, procured a wrench and started to adjust them. The rolls were adjusted by means of a thumbscrew, placed towards the bottom of the machine immediately in front of and near certain cogwheels forming a part of the gearing of the machine. As he was working with the thumbscrew, the machine suddenly started, as the respondent claims, automatically,

caught his hand in the gearing, and crushed off two of his fingers.

In his complaint the respondent set up two grounds of negligence; first, that the appellant did not keep the belt connecting the resaw with the power shaft of the mill at a proper tension, thereby rendering it possible for the machine to start into motion automatically; and second, that the appellant had failed and neglected to place guards over the gearing on which the respondent received his injury. At the trial, the respondent offered no direct evidence tending to show that the belt was not kept at a proper tension. The other side, however, introduced the evidence of its millwright and others of its employees to the effect that the belt was kept at all times in such a tension that it would not start the machine in motion unless increased by means of the weight, and that it was at a proper tension at the time the respondent was injured.

On the second ground of negligence, the respondent introduced evidence to the effect that the gearing was not guarded; that it could have been guarded effectively with due regard to the ordinary use of the machine; that the thumb-screw, which afforded the only means of regulating the feed rolls, was placed near the gearing, rendering it dangerous to attempt to move it while the machine was in motion. The appellant introduced evidence tending to show that the gearing was in such a position that no one could come into contact with it while operating the machine; and that to change the feed rolls the machine should be stopped; that it was not known to any of the officers or employees of the appellant having the mill in charge that this particular machine had ever started automatically. It was shown, however, that the machine, some six weeks or two months before the accident, did start without the aid of the weight, a fact known to the respondent but which he did not communicate to the appellant until after the accident. The respondent also offered, and was allowed to introduce over the objection of the ap-

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pellant, evidence to the effect that a belt-shifter would have been a better and safer device for starting and stopping the machine than the appliance used by the appellant.

On the trial at the conclusion of the evidence, the appellant challenged its sufficiency to justify a verdict for the respondent. The challenge was overruled by the court, and its action in so doing constitutes the first error assigned. The challenge is based on the contention that no negligence was shown on the part of the appellant. It is said that the proofs failed on both allegations of negligence set forth in the complaint; that there was no evidence at all that the belt operating the resaw had not been kept at its proper tension, and that it was shown that there was no reasonable necessity for placing a guard immediately over the gearing on which the respondent was injured, as the same was sufficiently guarded by the means which the appellant had afforded to stop and start the machine. As to the tension of the belt, we agree with the appellant that no negligence in that regard was shown; that the evidence which the court admitted for that purpose does not tend to establish the fact.

As to the necessity for a guard immediately over the gearing, we think that was a question for the jury. The factory act provides that the gearings of all machinery with which employees of a factory are liable to come in contact while in the performance of their duties shall be provided with reasonable safeguards, where it is practical to guard them, and where they can be effectively guarded with due regard to the ordinary uses of the machinery. The evidence abundantly shows that this particular gearing could have been guarded effectively without in anyway interfering with the due operation of the machine; and it was shown, further, that the operator of the machine in the performance of his duties was liable to come in contact with it whenever it became necessary for him to adjust the pitch of the rolls which fed the saw. The fact that the operator was expected to stop the machine before he attempted to adjust the rolls, and that an

appliance for that purpose was furnished, does not necessarily excuse the failure to guard. Machinery connected with moving power shafts which are stopped and started by means of contrivances depending for their efficiency on correct measurements and a proper adjustment of weights are liable to become out of adjustment at any time, and stop or start automatically. Whether the appellant should have anticipated this fact and guarded this particular gearing we think was for the jury, especially in view of the somewhat definite provisions of the statute to which we have referred.

The appellant requested the following instructions, which the court refused:

"I instruct you that if the plaintiff started to or did tilt the rolls on the resaw machine in question without first stopping the machine thereby causing his injury, then the plaintiff would be guilty of negligence as a matter of law, and he cannot recover, and your verdict must be for the defendant.

"If you find that the plaintiff had knowledge of the fact, if it is a fact, that the machine prior to the accident had started automatically, I instruct you that it was his duty to notify the defendant or its foreman of such fact, and if he failed so to do he assumed the risk of injury and cannot recover provided you find further that the method or means provided by the defendant for starting or stopping the machine was a suitable and proper guard against accidents from exposed gearings."

These instructions were properly refused. The first, on the ground that the deduction to be drawn from the act suggested was for the jury to draw rather than the court. As we say the statute requires the gearings of all machinery with which an employee is liable to come in contact to be guarded when it is practicable to do so, hence, in this instance if this was a gearing that should have been guarded the respondent did not assume the risk of injury therefrom as a part of his contract of hire. His liability was for contributory negligence, and whether the act imputed by the instruction amounted to contributory negligence was for the jury. It was a question on which reasonable minds might



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reasonably differ. The second was properly refused because it is not the law that the respondent would assume the risk of injury from the automatic starting of the machine merely because it so started once before and he failed to notify his employer of the fact. Whether his knowledge would estop him from complaining depends upon other and additional facts. It may be that the employer already knew the fact, or the employee had good reason to believe that the employer knew it. In either of these cases, and in perhaps many others, no estoppel would follow. The instruction is faulty in that it does not take into consideration these possibilities.

With reference to the evidence concerning the belt-shifter, the court gave the following instructions:

"The plaintiff claims defendant was negligent. First, in not guarding the gearing; second, in allowing the belt to be kept at an improper tension. The lack of a belt-shifter can be considered by you only in determining whether the belt was kept at a proper tension.

"The only negligence complained of by plaintiff is that the drivebelt on this machine was not kept at a proper tension thereby causing the machine to start automatically, and that the cogs and gearing were unguarded contrary to law. In considering this case you must confine yourselves to these issues and disregard all testimony that a belt-shifter was a safer or better appliance than the one used by defendant in stopping and starting the machine, except as such evidence may bear upon the question of the tension of the belt."

The admission of this evidence and the giving of these instructions was error. Tension of a belt usually has reference to the degree of strain to which it is subjected, and in this case it had reference to the fact whether the belt was so tight as to cause it to create friction enough on the pulley connected with the machine to put the machine in motion without the addition of the weight. Whether a belt-shifter would have been a better device for stopping and starting the machine than the device installed by the appellant could not possibly have any bearing on the question of the tension

of the belt. The respondent argues, however, that if the evidence had no bearing upon the question of the belt it was not injurious, and hence not reversible error. But this argument overlooks the fact that the court in its instructions charged them, in effect, that it did have some such bearing. If the jury obeyed the instructions of the court—and we must presume that they did—they gave it heed in determining the issues, and in doing so founded the verdict on erroneously admitted evidence.

For the error noticed, the judgment is reversed and the cause remanded for a new trial.

MOUNT and ELLIS, JJ., concur.

MORRIS, J., concurs in the result.

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[No. 10095. Department Two. June 14, 1912.]

HARRISON B. MARTIN, *Appellant*, v. THE CITY OF OLYMPIA,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS—PUBLIC PURPOSES—PROCEEDINGS—ORDINANCE. An ordinance for a local improvement by filling tide lands is not invalid by reason of a recital that one of its purposes was for the "general improvement of the property," where it also appears that it was necessary to the public health, sanitation and general welfare, within Rem. & Bal. Code, § 7971.

SAME—ASSESSMENTS—DISTRICTS—LANDS ASSESSABLE. Rem. & Bal. Code, § 7971 *et seq.*, for the filling of tide and swamp lands by cities, authorizes the assessment of property benefited thereby situated within the assessment district, although it was not part of the land filled in.

SAME—ASSESSMENT—CONCLUSIVENESS—ACTION TO SET ASIDE—COMPLAINT—SUFFICIENCY. Under Rem. & Bal. Code, §§ 7976, 7977, giving the right of appeal from a city assessment for filling tide and swamp lands to any person filing objections before the city council, sitting as a board of equalization, the action of the city council is final as to all persons not objecting, in the absence of fraud or arbitrary action; hence a complaint to set aside an assessment by one

<sup>1</sup>Reported in 124 Pac. 214.

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who made no objections is insufficient where it alleges merely that the property was not benefited, without alleging any irregularity or any facts showing capricious or arbitrary action.

**SAME—ASSESSMENT—NOTICE—PRESUMPTIONS.** In an action to set aside a local assessment, the fact that the plaintiff had no notice of the assessment in time to object before the city council is immaterial, if the statutory notice was given, which will be presumed in the absence of allegations to the contrary.

**PLEADING—COMPLAINT—CONCLUSIONS.** In an action to set aside a local assessment, allegations in the complaint that plaintiff's property was taken without due process of law, or any authority and that the assessment was for a private use, and contrary to law, are mere conclusions of law presenting no issuable facts.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 29, 1911, dismissing an action to set aside a special assessment, upon sustaining a demurrer to the complaint. Affirmed.

*Harrison B. Martin*, for appellant.

*Chas. Ethelbert Claypool*, for respondent.

FULLERTON, J.—The appellant brought this action against the respondent, city of Olympia, to cancel and set aside a special assessment levied by the respondent on certain tide lands owned by him. A general demurrer was interposed to the complaint, which the trial court sustained. The appellant elected to stand on his complaint and refused to plead further, whereupon judgment of dismissal and for costs was entered against him. This appeal followed.

The appellant in his complaint alleged his ownership of the property, the corporate capacity of the respondent, the resolution and ordinance authorizing the improvement which gave rise to the assessment, and then continued as follows:

“V. That in pursuance of said resolution and ordinance the said city council, through the officers of said city, caused a portion of said property mentioned in said resolution and in said ordinance to be filled, but did not fill, or cause to be filled, any of the lands of the plaintiff in any degree whatsoever; that the said lands of the plaintiff are situated a long

distance from, and outside of, the bulkhead of said fill, and derive no benefit from said fill, and are, and at all times in this complaint mentioned, were, covered with salt water many feet deep, and are now, and at all times herein mentioned, have been in the same condition as they were in before the said fill was made.

“VI. That in pursuance of said resolution and ordinance the said city council, through the officers of said city, caused the real property of plaintiff to be assessed for an alleged and pretended proportion of the expense of such filling, in the following amounts, to wit:

Lot 1 of said block 67 A.....	\$ 60.88
Lot 2 of said block 67 A.....	50.69
Lot 3 of said block 67 A.....	43.14
Lot 4 of said block 67 A.....	51.64
Lot 5 of said block 67 A.....	62.58
Lot 3 of said block 69 A.....	.79

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Total assessment .....\$269.72

“VII. That the plaintiff had no notice or knowledge of said fill until long after the same was completed and had no notice of any of the proceedings under which said fill was made, and had no notice that his property was assessed in any amount for said fill, and that the plaintiff's first information and knowledge that his said property was assessed for said fill came to him only a few days prior to the institution of this action.

“VIII. That by reason of said assessment and the proceedings under which the same is based, the said city claims a lien upon the said property of the plaintiff; and that such claim of lien is illegal and void and is a cloud upon the title of plaintiff to said real property, and that unless restrained by order of this court the said city, through its officers and agents, will proceed to sell the right, title and interest of plaintiff in said real estate so assessed, and by such sale will do this plaintiff irreparable injury and damage.

“IX. That all the proceedings had by the said defendant, the city of Olympia, its officers, contractors and sub-contractors, and all persons acting or pretending to act for and on behalf of the defendant, the city of Olympia, in making said alleged fill, were without authority of law and void; and that the said assessments so levied upon said property of the

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plaintiff are illegal, inequitable, unjust, oppressive and void, and have created an illegal, unjust and inequitable lien and cloud upon the plaintiff's title to his aforementioned property for the following reasons, to wit:

"(1) The said assessment takes from the plaintiff his property without due process of law.

"(2) There is no authority in law whereby the said city obtained any right under said resolution, ordinance and the various proceedings had thereunder and by virtue thereof, to interfere with or fill any private property.

"(3) There is no authority in law whereby the said city can levy an assessment upon any private property to pay for such interference with, and filling of private property by the said city, its officers, contractors and subcontractors.

"(4) The fill in question was for a private use, and the making thereof was contrary to law.

"(5) The said assessment levied against the said property of the plaintiff was contrary to law."

The improvement made by the city was the filling of certain tide lands or mud flats which lay within the boundaries of the city. The proceedings were had under the act of the legislature of March 7, 1909 (Laws 1909, ch. 147, p. 569; Rem. & Bal. Code, § 7971), the first section of which provides that "whenever the city council of any city of the second and third class shall deem it necessary or expedient on account of the public health, sanitation, the general welfare, or other cause, to fill or raise the grade or elevation of any marsh lands, swamp lands, tide lands, or lands commonly known as tide flats, . . . such city council shall have power so to do, etc." The city ordinance authorizing the improvement recites that the city council of the city of Olympia deems it "necessary and expedient on account of the public health, sanitation, the general welfare, and the general improvement of the property located within the boundaries hereinafter described," that the same be filled, graded, and the elevation raised, etc.

It is the appellant's first contention that the ordinance

is insufficient to authorize the work. This contention is founded on the last clause of the recital in the ordinance which sets forth the necessity for the fill. He argues that a fill for "the general improvement of the property" is a fill for a private and not a public purpose, and hence, an insufficient ground on which to base the exercise of the power conferred by the statute. But we cannot think this objection fatal to the ordinance. Were the reason assigned in the phrase quoted the sole reason that induced the city council to order the improvement, there would be merit in the contention. But it is not the sole reason. The ordinance recites that the fill is deemed necessary and expedient on account of the public health, sanitation and the general welfare, as well as for the reason to which the appellant objects. These are public purposes, and sufficient in themselves to authorize the work. *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369, 30 L. R. A. (N. S.) 709. The recital in addition thereto of an insufficient purpose does not render the ordinance void.

The appellant's lands were within the assessment district created by the ordinance, although not a part of the tide lands ordered to be filled; and his second contention is that the act authorizing the making of the improvement limits the power of assessment to property actually filled. But we cannot so read the act. The act is too long to be set forth here, but plainly it permits the assessment to cover all property benefited by the improvement regardless of the question whether the benefited property is or is not specifically improved.

The appellant next contends that the city should have been compelled to take issue on the allegation of the complaint to the effect that the appellant's lands are not benefited by the improvement. But this allegation raises no issuable fact. The act provides that an assessment roll shall be made of all property in the assessment district, which roll shall be filed in the office of the city clerk; that the city clerk shall

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give notice by publication of the time when the roll will be brought on for hearing before the city council, which will sit as a board of equalization to hear and determine objections and protests against the roll; that the council shall have power as such board to "make such alterations and modifications in the assessment roll as justice and equity may require;" that any person who has made objections to the assessment roll shall have the right to appeal from the equalization, as made by the city council, to the superior court of the county in which the city making the improvement is situated, and from the judgment of the superior court, the right to appeal to the supreme court as in other causes. Laws 1909, p. 573, §§ 6, 7; Rem. & Bal. Code, §§ 7976, 7977. It was the evident purpose of the legislature by these provisions to make the city council the court of original jurisdiction to hear and determine objections to the correctness of the assessment roll, and to leave to the courts the exercise of appellate jurisdiction only over the matter. While the act does not in terms make the decision of the city council as to the correctness of the assessment roll final and conclusive if not appealed from, we think that it makes the decisions of that body final in the sense that its orders and decisions can be set aside only for excessive or exorbitant overvaluation, fraud, or arbitrary or capricious action on the part of the officers in making the assessment; analogous to the orders and decisions of the board of county commissioners, sitting as a board of equalization, with reference to the general tax roll. *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553. Here there is no charge in the complaint that the proceedings leading up to the assessment are irregular or insufficient, nor is it charged that the officers making up the assessment roll or the city council when it considered it sitting as a board of equalization acted fraudulently or capriciously or otherwise than in a conscientious endeavor to do their duty. The presumption

of regularity therefore obtains to all of the proceedings, and we cannot think it overcome by the mere allegation of the pleader to the effect that particular property found by the assessing officers and the city council to be benefited by the improvement in a given sum, is not so benefited. Some additional fact tending to show capricious or arbitrary action on the part of the assessing officers because of which the amount returned does not represent their honest judgment, some fact which shows that the allegation of want of benefit to the property is founded on something more than a mere difference of opinion between the taxing officers and the pleader, must be alleged before that result follows.

Nor is the allegation aided by the further allegation to the effect that the appellant had no actual notice of the fill until long after the same had been completed and had no notice of the city's intention to make an assessment upon his property until after the assessment had been made. There being no allegation to the contrary, the presumption is that the city gave the notice the statute requires to be given, and if the notice prescribed does not in all instances give actual notice, the fault is in the law itself and not in the act of the officers who comply therewith. That the law is sufficient in this respect was held by us in *Bowes v. Aberdeen, supra*.

The allegations contained in the ninth paragraph of the complaint quoted set up no issuable fact. These are but the conclusions of the pleader drawn from the facts previously set forth.

The complaint does not state a cause of action, and the judgment appealed from will stand affirmed.

DUNBAR, C. J., MOUNT, and ELLIS, JJ., concur.



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[No. 10112. Department Two. June 14, 1912.]

**FRANK KLAIN, *Respondent*, v. N. G. KAUFMAN, *Appellant*.<sup>1</sup>**

**PARTNERSHIP—EXISTENCE—ADVANCES FOR SHARE OF PROFITS—EVIDENCE—SUFFICIENCY.** A partnership is not shown where it merely appears that one agreed to advance the cost of operating a business belonging to another, in consideration of one-half the net profits, if any, the advances to be returned in any event.

**APPEAL — PRESERVATION OF GROUNDS — OBJECTIONS — VARIANCE.** Error cannot be predicated upon a variance, where no objection was made to the admission of the evidence and the point was not suggested below.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered April 24, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*J. C. Cross*, for appellant.

*Boner & Boner*, for respondent.

FULLERTON, J.—This is an action for personal services, and for the value of certain farm products. In his complaint, for a first cause of action, the plaintiff alleged that the defendants Buttner and Kaufman were partners, engaged in the logging business, and that, between January 1, 1910, and August 1, 1910, he performed services for them as foreman of their logging camp at the agreed price and value of \$1,055, no part of which had been paid. For a second cause of action he alleged that, during the time the defendants were operating their logging camp he furnished, at their special instance and request for the use of such camp, butter, milk and vegetables, of the value of \$374, which were likewise unpaid for. No services of process was had upon Buttner, and he did not appear in the action. Kaufman appeared and filed an answer in which he denied

<sup>1</sup>Reported in 124 Pac. 213.

generally all the allegations of the complaint, and alleged affirmatively that, between January 1, 1910, and January 28, 1911, he advanced for the plaintiff's use "in his logging scheme or business" the sum of \$10,952.84 of which there had been repaid him the sum of \$708.28 leaving a balance due and owing of \$10,244.56 for which sum he demanded judgment against the plaintiff. A reply was filed putting in issue the affirmative allegations of the answer. On the issues made, a trial was had before the court sitting with a jury, which resulted in a verdict and judgment against Kaufman personally in the sum of \$1,279.20. This appeal is from the judgment so entered.

But one question is suggested by the appellant, namely, the regularity of the verdict and judgment. It is contended that the evidence on the part of the plaintiff followed the allegations of his complaint and tended to show that the defendants were partners conducting the logging business as a partnership; and that, if either of them was liable for the plaintiff's wages and the advancements made to the logging camp, both of them were liable; hence the verdict and judgment should have been entered against both of the defendants, to be satisfied out of the partnership property of both of them and the separate property of the defendant served.

But we cannot agree with the appellant as to the effect of the evidence. As we read the record, there is little or no evidence on the part of either the plaintiff or the defendant that a partnership relation ever existed between Buttner and Kaufman. On the contrary, the evidence of both sides is to the effect that Kaufman, instead of being a partner of Buttner's, succeeded to Buttner's interests by assignment from Buttner; that the agreement concerning the business was first entered into between Klain and Buttner and that Kaufman afterwards purchased Buttner's interest and assumed Buttner's obligations under the contract. The real contest between the parties was over the terms of the con-

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tract. Klain insisted that the business was first Buttner's, then Kaufman's, and that he was an employee first of the one and then of the other, at a wage of five dollars per day with the right to receive one-half of the net profits of the business after all the expenses were paid; while Kaufman insisted that the business was Klain's, and that he simply agreed to advance the cost of operating the business in consideration of one-half the net profits of the business should any profit accrue, but his advancements were to be returned nevertheless. The jury accepted Klain's version of the agreement, and since that version is supported by substantial evidence, it is of course conclusive upon us here.

It is manifest from the foregoing that the verdict is in accord with the real issue, and the issue that was actually tried out to the jury, and hence is not subject to be set aside because not in accordance with the facts. It has seemed to us that the real question is whether there was a variance between the allegations of the complaint and the proofs of the plaintiff, but this question we shall not discuss as it was clearly waived by the defendant. Not only did he fail to suggest it at the trial, but he permitted the evidence of the real relations of the parties to be submitted to the jury without objection, and he is now bound by their verdict.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, MORRIS, and ELLIS, JJ., concur.

[No. 10132. Department Two. June 14, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. JAKE  
RUBENSTEIN, *Appellant*.<sup>1</sup>

RECEIVING STOLEN GOODS—EVIDENCE—SUFFICIENCY. A conviction of larceny by receiving stolen goods is sustained where it appears that the accused received ostrich plumes which he knew had been stolen and sold them with intent to deprive the owner thereof.

SAME—INSTRUCTIONS. In a prosecution for larceny by receiving and disposing of stolen goods, it is error to instruct upon the subject of defendant's knowledge respecting the theft, that knowledge of any particular fact may be inferred from the knowledge of such other facts as would put an ordinary prudent man upon inquiry, and that the state must prove beyond a reasonable doubt either that defendant had actual knowledge that the goods were stolen or was in possession of facts that would put an ordinary prudent man on inquiry; since it compelled the jury to infer the fact of knowledge instead of leaving the inference to be drawn by the jury.

CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS. Upon appeal in a criminal case, an admittedly erroneous instruction cannot be disregarded as an inadvertence, or as incorrectly reported, as the record is conclusive.

DUNBAR, C. J., dissents.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 30, 1911, upon a trial and conviction of larceny. Reversed.

*Reynolds, Ballinger & Hutson*, for appellant.

*John F. Murphy, Hugh M. Caldwell, and H. B. Butler*, for respondent.

FULLERTON, J.—This is an appeal from a judgment entered upon the verdict of a jury finding the appellant guilty of larceny. In the information it is charged that the appellant, in the county of King, state of Washington, on the 4th day of March, 1911, with intent to deprive and defraud the owner thereof, wilfully, unlawfully, and feloni-

<sup>1</sup>Reported in 124 Pac. 135.

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ously did buy, receive, and aid in the concealment of certain described stolen property, knowing the same to have been stolen. The evidence introduced at the trial tended to show that, in the early part of March, 1911, the place of business of one Elise Moltman, in the city of Seattle, was broken into and ostrich plumes of a considerable value taken therefrom. Sometime later Mrs. Moltman saw some of the stolen plumes in the show window of a concern doing an outfitting business, conducted by Samuel Paul and Joseph Paul. She reported the discovery to the police, and in company with a police officer, went to the place, where she found and identified plumes to the value of some two hundred and fifty dollars which had been taken from her place of business. The evidence introduced at the trial tended to show that the plumes were brought to the business place of the Pauls by the appellant in a grip, the visit being made shortly before the noon hour; that the appellant inquired of the Pauls whether or not they could use some second-hand plumes; and being informed that they could, opened the grip and took therefrom the stolen plumes, and offered them for sale at \$150; that the Pauls made a counter offer for them of \$75, and a little later offered \$85. The appellant then said he would leave the plumes with them and would come back in a few minutes and let them know whether he would accept that price or not. A little later he came back and said he would take that sum for them. The sale was then made, the purchasers paying the purchase price in cash. The remaining evidence on the part of the state consisted of the statements of the police officer as to the conduct of the appellant at the time of his arrest. It is said that he denied having knowledge of what a plume was until he was shown one on a woman's hat, and denied ever having dealt in them or sold any of them until told that the Paul brothers had said that he sold certain plumes to them; that he then "turned pale" and partially fainted, and made exclamations which might be construed as tending to show guilty knowledge on his part;

that he afterwards related to the police officers how he came into possession of the plumes; saying that he received them for sale from a man he had formerly known in Alaska; that, of the purchase price, he gave the man \$80, retaining five dollars for himself.

It is the appellant's first contention that the evidence is insufficient to justify a verdict against him, and that the trial court should have sustained his challenge to the evidence made at the conclusion of the state's case. But we think the evidence made a case for the jury. It was made to appear conclusively that the appellant received and disposed of stolen property; and there was evidence, although not perhaps so conclusive, that he knew at the time he received the property that the same had been stolen, and that he disposed of it with the intent to deprive and defraud the owner thereof. It is the province of the jury in criminal cases to pass on the weight and sufficiency of the evidence; and when the court finds there is substantial evidence of a fact, it must be left for the jury to say whether its probative force meets the standard required for a conviction, whether it convinces them beyond a reasonable doubt of the defendant's guilt.

The court gave the following instruction:

"You are instructed in this case that the following facts must be established beyond a reasonable doubt by the state in order to convict the defendant of the crime charged in the information: 1st, it must be established that the goods, or some of them, described in the information had, in fact by some person known, or unknown, been stolen, in King county, Washington; 2nd, that the said goods had been received by the defendant and that at the time he knew that the same were stolen. In this connection, I instruct you that knowledge of any particular fact may be inferred from the knowledge of such other facts as would put an ordinary prudent man upon inquiry, and it therefore is incumbent upon the state to prove in this case, beyond a reasonable doubt, either that the defendant had actual knowledge that the property was stolen, or that he was in possession of facts

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and circumstances which would put an ordinary, prudent man upon inquiry.”

The concluding clause of this instruction, we think, does not correctly state the rule. While the statute provides that knowledge of any particular fact may be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry, it is not meant to be asserted thereby that the jury, in a case where knowledge is an essential element of a crime, may find that the accused had such knowledge on evidence that does not convince them of the fact beyond a reasonable doubt. The jury, if they find that the accused had knowledge of facts that should put a reasonable man upon inquiry as to a particular fact, may infer therefrom that he had knowledge of the particular fact, but they are not obligated to draw the inference. The statute lays down a rule of evidence, not one of positive law. Its language is that knowledge of any particular fact “may” be inferred from the knowledge of such other facts as should put an ordinarily prudent man upon inquiry; not that it “must” be so inferred; hence, it was error to instruct the jury that it is sufficient proof that the defendant had knowledge that the property received and disposed of by him was stolen property to prove beyond a reasonable doubt that he had knowledge of facts sufficient to put an ordinarily prudent person upon inquiry as to whether or not it was stolen property. The jury might properly have been instructed that they could infer that the defendant had such knowledge from proofs of the other fact, but they should have been left to draw the inference themselves, and instructed unqualifiedly that, in order to find the defendant guilty, the evidence must convince them beyond a reasonable doubt that he had knowledge at the time he received and disposed of the property that the same was stolen property.

The court also gave the following instruction:

“If any of the property mentioned in this information was taken from the owners without their consent, and against

their will, and with intent to deprive the owners thereof, then such property was stolen property; and if thereafter the defendant, with intent to deprive or defraud the owner thereof, received any part of such property, with knowledge that the same was stolen, he, by that act, committed an act of larceny, and became guilty of larceny; or if he received the same without knowledge that they were stolen, concealed or withheld, or aided in the concealing or withholding of any property, with intent to deprive or defraud the owner thereof, then he became guilty of larceny."

It is conceded by the state that the instruction is made erroneous by the use of the word "without" in the last clause of the instruction, but it is contended that the use of the word was an inadvertence on the part of the court, or perhaps a mistake of the stenographer in taking down the judge's words. But the instruction has other faults than the one indicated. As it is transcribed, it is scarcely intelligible, and it is impossible now to know what idea the jury may have gathered therefrom. The suggestion that the judge's words were not correctly reported in this particular paragraph gains force when the balance of his instructions, which are unusually clear, are considered; but the record is before us over the judge's signature, and we must accept it as a true transcript of the proceedings. As set forth therein, the instruction is error.

The other assignments of error do not require special consideration. The judgment appealed from is reversed and a new trial awarded.

MOUNT, ELLIS, and MORRIS, JJ., concur.

DUNBAR, C. J., dissents.



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[No. 10345. Department Two. June 14, 1912.]

VICTOR AHO, *Respondent*, v. COAST COAL COMPANY,  
*Appellant*.<sup>1</sup>

MASTER AND SERVANT—INJURIES—SAFE PLACE—CONTRIBUTORY NEGLIGENCE—COMPLAINT—SUFFICIENCY. A complaint for injuries to a coal miner from falling overhead rock is not demurrable as showing contributory negligence from the fact that it admitted that plaintiff went to work in a place “apparently somewhat unsafe” from want of timbers, which defendant had failed to supply, and which for that reason relieved the plaintiff from the assumption of risks.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$4,000 for injuries to a coal miner 31 years of age, earning \$100 a month, is not excessive, where his leg was broken in two places, resulting in a thickening of the thigh bone, bending of the leg, and a loss of motion of 90 degrees of the knee joint, and the injury was permanent and incapacitated him from following his employment.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered November 9, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a coal miner in the fall of rock. Affirmed.

*Williamson, Williamson & Freeman*, for appellant.

*Bates, Peer & Peterson*, for respondent.

FULLERTON, J.—The appellant owns and operates a coal mine, located at Spiketon, in Pierce county. The respondent was employed by the appellant to work as a miner therein, and while so engaged with others driving a gangway or tunnel along the coal vein, was injured by a piece of shale rock falling upon him from the roof of the gangway. In his complaint the respondent stated the cause and manner of his injury in the following language:

“That while employed by defendant at mining in said vein of coal on said 23rd day of September, 1910, plaintiff and his partner, John Johnson, came to a place in said vein about

<sup>1</sup>Reported in 124 Pac. 108.

6 feet from the face thereof where a large piece of shale rock was hanging from the ceiling apparently somewhat unsafe, whereupon plaintiff and his said partner decided for their safety that it was necessary and proper to put in a timber and brace said portion of the roof, whereupon they went to the entrance of said gangway where timbers were kept for them with which to brace and protect and guard their working places, but defendant had failed to provide or deliver to plaintiff and his partner at the said place, or at their working place, or at the entrance thereto, any timbers or props with which to brace said shale rock, and with which to brace and protect said working place, whereupon plaintiff returned to said working place and proceeded to work clearing up and shoveling out coal therefrom, and while so engaged a large portion of the shale rock in said roof and particularly that portion thereof hanging from the ceiling, above referred to, and for which he sought timbers to brace and protect as hereinbefore alleged, fell down and upon plaintiff, striking him on the left leg, knocking him to the floor of said tunnel and crushing his left leg, breaking the same above the knee and in two places below the knee."

To the complaint the appellant interposed a general demurrer, which was overruled, whereupon it answered to the merits. A trial was thereafter had, which resulted in a verdict and judgment for the respondent.

The appellant first assigns that the court erred in refusing to sustain its demurrer to the complaint. It is contended that the complaint shows upon its face that the respondent was guilty of contributory negligence. This contention has its basis in the allegation in the paragraph quoted to the effect that the respondent observed, prior to his injury, that a "large piece of shale rock was hanging from the ceiling apparently somewhat unsafe." It is argued that, while the act of the appellant in failing to keep a sufficient supply of timbers or props to enable the respondent to properly protect his working place may have relieved the respondent from the risk of injury by objects falling from the ceiling of the gangway he assumed in his contract of hire, it did not excuse contributory negligence on his part, and that it was

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contributory negligence for the respondent to work under the rock knowing that it was apparently unsafe. In other words, the contention is that while the respondent did not assume the risk of working in the dangerous place, yet he was nevertheless guilty of contributory negligence in working therein knowing it to be unsafe. But this court has heretofore refused to recognize this contention as sound. In *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915, the plaintiff was injured on an unguarded set screw which was allowed to project from a revolving shaft over which he was required to work. It was argued that, while the plaintiff might not have assumed the risk of injury from the unguarded set screw, owing to the fact that the defendant had not complied with the statute requiring such set screws to be guarded, he was nevertheless guilty of contributory negligence in working over the set screw, as he knew that there was danger of injury by so doing. Answering the objection it was said:

“The appellant next contends that the court erred in refusing to rule, as a matter of law, that the respondent was guilty of contributory negligence. All that the evidence shows on this question is that the respondent continued in his work after he had knowledge of the fact that the collar and set screw which caused his injury were uncovered. But it will hardly do to say that an employee is guilty of contributory negligence for merely working in a dangerous place when he does not assume the risk of injury for working therein. It is true that in such cases contributory negligence and assumption of risk approximate, and it is difficult to draw a line between them, but we think that, to convict an employee of contributory negligence for working in a place where he does not assume the risk of injury, it must be shown that he did not use care reasonably commensurate with the risk to avoid injurious consequences; in other words, that it was some negligent act of his own that caused his injury, and not alone the dangers of his situation.”

In *Starck v. Washington Union Coal Co.*, 61 Wash. 213, 112 Pac. 235, the same question was presented. In that

case, as in the case at bar, the plaintiff was injured while working in a coal mine, by the caving in and falling upon him of objects from the roof of the cut in which he was working. Sufficient props had not been supplied the workman to keep the place of work reasonably safe, and it was shown that he knew that there was more or less danger in working in the place without such props. It was argued that he was, because of his knowledge of the dangers of his situation, guilty of contributory negligence for continuing to work therein; but it was held that the contention could not be maintained, the court saying:

"It is true that in *Green v. Western American Co.*, *supra*, which was the first case in this jurisdiction to lay down the rule that the master assumed the risk where the statutory requirements in regard to safe place and appliances had not been complied with, there were some expressions used by the court which might readily lead to the conclusion that the doctrine claimed for it by the appellant was true, viz., that while the plaintiff in an action for damages in a case brought under the statute for violation of, failure to guard, or make safe, would not be held to have assumed the risk, he would be held to have been guilty of contributory negligence for working in an unsafe place. But this doctrine certainly never was intended by the court to be carried so far as to hold that a plaintiff would be held guilty of contributory negligence for working in a place where he would not be held to have assumed the risk in working. No court would trifle with the rights of a litigant to such an extent as to hold that he could recover in a given case because he did not assume the risk of working in a certain place, and then hold that he could not recover because he was guilty of contributory negligence in working in that certain place. This would be allowing words and terms to control a principle. . . .

"There can be no question but that cases might arise where contributory negligence would be an element in the case available to the defendant, but the two propositions have no real relation to each other. One relates to the risks assumed by an employee in the entering into a given service, and the other to the vigilance to be exercised by the em-

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ployee under certain circumstances; that is to say, that the servant may be guilty of contributory negligence in a case where the master has neglected or refused to perform a statutory duty, but the negligence has no relation to the place, but must be negligence in the doing of some independent act on the part of the servant, which is the proximate cause of his injury. It must be borne in mind, however, that it is this independent act of the servant, instead of the danger of the place or of the machinery, which causes the accident."

These cases are conclusive of the contention made here. The respondent was not guilty of any overt act of negligence; all that he did was to work in a place "apparently somewhat unsafe;" and since he did not assume the risk of injury for working therein, it would be, as was said in the case last cited, "allowing words to control principles to hold that he was guilty of contributory negligence."

The respondent recovered judgment in the sum of \$4,000. It is argued that this is excessive. The evidence shows that the respondent was 31 years of age at the time of his injury; that he was earning \$100 per month; that his leg was broken in two places, and at the time of the trial was not sufficiently healed to enable him to walk without crutches; that there was a thickening of the thigh bone, a bending of the leg forward, a loss of motion of some 90 degrees of the knee joint, a stiffening of the ankle; that the injury was permanent and the respondent incapacitated from following his occupation of a miner. In view of the record, we cannot hold the damages excessive.

The other errors assigned are met by what we have said concerning the demurrer to the complaint.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, MORRIS, and ELLIS, JJ., concur.

[No. 9841. Department Two. June 14, 1912.]

**THELMA OLSON, *Appellant*, v. J. J. HAGGERTY *et al.*,  
*Respondents*.<sup>1</sup>**

**MALICIOUS PROSECUTION—SEARCH PROCEEDINGS—NAMING PLAINTIFF.** A malicious prosecution may be based upon search proceedings; and Rem. & Bal. Code, §§ 2237, 2239, not requiring the proceedings or warrant to designate the person suspected, it is not necessary that the proceedings name the plaintiff as the suspected party.

**SAME—DESIGNATION OF PREMISES.** A search warrant describes the plaintiff's "place of residence" so as to enable her to maintain an action for malicious prosecution, where it mentions the dwelling and premises of another wherein the plaintiff was a "resident, lodger, and inmate," and where it appears that the relation of landlord and tenant did not exist between the plaintiff and the owner of the house, and plaintiff did not maintain a distinct establishment therein.

**SAME—SUFFICIENCY OF WARRANT—LIABILITY OF INSTIGATOR.** One who institutes search proceedings and directs the sheriff's search of plaintiff's effects thereunder may be guilty of malicious prosecution, even if the search warrant was technically insufficient to protect the officer.

**SAME—LIABILITY—ESSENTIALS—ARREST OR SEIZURE OF PROPERTY.** The arrest of the person or the seizure of property is not essential to sustain an action for malicious prosecution in the institution of search proceedings.

**SAME—DAMAGES—SPECIAL DAMAGES.** The disgrace, humiliation and public suspicion caused by a search warrant to recover stolen goods are sufficient elements of damage to sustain a substantial recovery for malicious prosecution, without proof of pecuniary loss or special damage.

Appeal from a judgment of the superior court for Pacific county, Smith, J., entered August 15, 1911, dismissing an action for malicious prosecution, upon sustaining demurrers to the complaint. Reversed.

*H. W. B. Hewen*, for appellant.

*Chas. E. Miller*, for respondents Haggerty.

*Welsh & Welsh*, for respondent Swanson.

<sup>1</sup>Reported in 124 Pac. 145.

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Opinion Per ELLIS, J.

ELLIS, J.—An action for malicious prosecution. The complaint, which is voluminous, in substance alleges that the defendants Haggerty and Haggerty are husband and wife, and the defendant Swanson is their daughter; that the plaintiff, an unmarried woman, is a teacher in the public schools at South Bend, in Pacific county; that, in pursuance of a conspiracy between the defendants to defame the reputation and good name of the plaintiff, the defendant Swanson, on April 14, 1911, made and filed an affidavit and complaint for a search warrant with a justice of the peace, so as to cause the plaintiff to be suspected of theft, and to procure her lodging room and personal effects in the house of Mrs. C. A. Heath, at South Bend, to be searched for certain goods alleged to have been stolen; that the plaintiff was a resident, lodger, and inmate of the house and home of Mrs. C. A. Heath, and her wearing apparel and personal effects were in a room occupied by the plaintiff in that house. It is further alleged that, upon the complaint, the defendants caused a search warrant to be issued for the search of that house; that they, under color and pretense of executing the warrant, directed and caused the room of the plaintiff, her trunk, boxes, wardrobe, satchel, wearing apparel, and all personal effects contained in her room or belonging to the plaintiff contained in the house of Mrs. C. A. Heath, to be entered, opened, and searched for stolen goods, by the sheriff and his assistant; that the plaintiff and one Linda M. Loeffler were then teachers in what is known as the Broadway school, in South Bend, and were the only teachers rooming at the house of Mrs. Heath; and that by direction of the defendants to the sheriff, no portion of the house occupied by others than the plaintiff and Miss Loeffler, and no articles or effects belonging to others than the plaintiff and Miss Loeffler, were searched pursuant to the warrant. It is also averred that none of the alleged stolen articles were found, and that the sheriff returned the warrant to the justice of the peace with an indorsement as follows:

"State of Washington, County of Pacific, ss.:

"I hereby certify and return that the within search warrant came into my hands on the 14th day of April, 1911, and that on the 14th day of April, 1911, at 7 o'clock p. m., I made thorough and careful search of the premises of Mrs. C. A. Heath, in South Bend, Washington, and particularly of the personal property and effects of Thelma Olson and Linda Loeffler, in said place as therein commanded, and that I found none of the goods and articles described in the within search warrant or any information of same, and therefore return this warrant into court.

"T. J. Stephens, Sheriff of said County."

"Dated May 20th, 1911.

It is then alleged that the defendants have not further prosecuted the complaint, have produced no evidence in support of it; that the proceedings have terminated in plaintiff's favor; that the defendants have made no reparation for the injury done; and that the charge in every respect relating to the plaintiff and Miss Loeffler was untrue. It is further charged:

"That in causing, procuring, persuading and advising said Florence Swanson to make, sign, file and publish said affidavit, and in causing and directing the effects of plaintiff and her lodgings to be searched by the officers of the law for stolen goods, said J. J. Haggerty and Georgiana Haggerty acted, in conjunction with Florence Swanson, maliciously and without probable cause, and with intent to injure the reputation of plaintiff, and for the purpose of causing her to be suspected of theft, and expose her to public hatred, contempt and ridicule and that said Florence Swanson in making, signing, and filing said affidavit and causing the personal effects and lodgings of plaintiff to be searched by officers of the law for stolen goods, acted in conjunction and connivance with her parents, J. J. Haggerty and Georgiana Haggerty, maliciously and without probable cause, and with intent to injure the reputation of plaintiff, and for the purpose of causing her to be suspected of theft, and to expose her to public hatred, contempt and ridicule."

As elements of damage, it is alleged that much notoriety resulted from the search, and the proceedings became the



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subject of general comment and gossip, resulting in ridicule of the plaintiff; that she was principal of the Broadway school, and the directors and principal of the South Bend schools conducted a public investigation of the charge, resulting in most humiliating notoriety, general suspicion, comment, and ridicule of the plaintiff throughout Pacific county, and that, by reason of the search, she has been and still is suspected by many of theft; has suffered great mental anguish and nervous strain, been deprived of her rest and sleep for many nights, been doubted by her friends and shunned by many of them, been the object of general suspicion, been compelled to justify herself and defend her private conduct and life to the school directors, and has suffered damage in her reputation and professional standing to the amount of \$5,000, for which sum judgment is prayed. A copy of the search warrant is attached to the complaint as an exhibit, and sufficiently sets out the affidavit. Omitting formal parts and signature, it is as follows:

“Whereas, Mrs. Florence Swanson has this day made complaint on oath to the undersigned, one of the justices of the peace in and for said county, that the following goods and chattels (describing them) the property of the said Mrs. Florence Swanson, have been within three days past, or were on or about the 12 or 13 day of April, 1911, by some persons or persons unknown, stolen, taken and carried away out of the possession of the said Mrs. Florence Swanson in the county aforesaid; and also that the said Mrs. F. Swanson verily believes that the said goods, or a part thereof, are concealed in or about the house or premises of Mrs. C. A. Heath of South Bend, in said county of Pacific and state of Washington . . .

“Therefore, in the name of the state of Washington, you are commanded that with the necessary and proper assistance you enter into the said house and premises and at any other place that in the discretion of the sheriff of Pacific county, the same may be found, and there diligently search for the said goods and chattels, and if the same, or any part thereof, be found on such search, bring the same, and also

the said parties forthwith before me, to be disposed of according to law."

Separate demurrers of the defendants Haggerty and of the defendant Swanson were sustained as to the charge of malicious prosecution, the court holding that the complaint did not state a cause of action on that ground, but that it was sufficient to sustain an action for unlawful and wrongful search. The plaintiff elected to stand upon her complaint and declined to prosecute the action as one of trespass. From a judgment of dismissal, the plaintiff has appealed.

It is familiar law that search proceedings, when maliciously instituted, or prosecuted without probable cause, may be made the basis of an action for malicious prosecution. 25 Am. & Eng. Ency. Law (2d ed.), p. 150; 35 Cyc. 1275, 1276. No question is made but that, in a proper case, the action would lie. It is contended, and the trial court held that, inasmuch as neither the affidavit nor the search warrant contained the name of the appellant, they did not constitute a criminal proceeding against her, and the complaint showing this fact stated no cause of action for malicious prosecution. If this contention is sound, then malicious prosecution could seldom if ever be based upon search proceedings in this state. Such proceedings are governed by chapter 22, Rem. & Bal. Code. The section governing the complaint or affidavit reads as follows:

"When complaint shall have been made on oath to any magistrate authorized to issue warrant in criminal cases that personal property has been stolen or embezzled, or obtained by false tokens or pretenses, and that the complainant believes that it is concealed in any particular house or place, the magistrate, if he be satisfied that there is a reasonable cause for such belief, shall issue a warrant for such property." Rem. & Bal. Code, § 2237.

There is no requirement that the complaint or affidavit shall contain any person's name, or that it shall directly charge any person with theft or other crime. It is sufficient

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if it describe the property and the suspected place of concealment. Search proceedings are essentially of a somewhat impersonal nature in their inception, being based upon suspicion rather than direct accusation. This is emphasized by the statutory provision as to what the search warrant shall contain. It is as follows:

“All such warrants shall be directed to the sheriff of the county or his deputy, or to any constable of the county, commanding such officer to search the house or place where the stolen property or other things for which he is required to search are believed to be concealed, which place and property or things to be searched for shall be designated and described in the warrant, and to bring such stolen property or other things, when found, and the person in whose possession the same shall be found, before the magistrate, who shall issue the warrant, or before some other magistrate or court having cognizance of the case.” Rem. & Bal. Code, § 2239.

This statute does not require that the warrant designate the person suspected, by name or otherwise. It is sufficient if it describe the suspected place of concealment and the things to be searched for. The affidavit here in question was sufficient basis for the issuance of the warrant, and the warrant contained the statutory essentials. It follows that the fact that it did not contain the name of the appellant did not alone make it an insufficient basis for an action for malicious prosecution on her part.

But it is urged—and the court held—that neither the affidavit nor the warrant mentioned the place of residence of the appellant; that the warrant did not authorize the search of any house or place but the house or premises of Mrs. C. A. Heath; that the power of the officer was limited by the warrant; and that, if he did search the appellant’s room as alleged, the respondents are not liable in an action for malicious prosecution for the officer’s unauthorized act in so doing.

The demurrers admitted the truth of the material allega-

tions of the complaint. The complaint alleged that the appellant was a "resident, lodger and inmate of the house and home of Mrs. C. A. Heath." If this is true, then the warrant did describe the place of residence of the appellant and did authorize its search. There is nothing in the complaint justifying the inference, contended for by respondents and adopted by the court, that the relation of landlord and tenant in any exclusive sense existed between Mrs. Heath and the appellant. We find nothing from which it can be reasonably inferred that the appellant occupied separate apartments under an exclusive possession or maintained a distinct establishment from that of Mrs. Heath. The idea is negatived by the allegation that she was an inmate of the house and home of Mrs. Heath and that her belongings which were searched were in a room in that house. Construing the affidavit and the warrant in connection with the statute, as we must, it is manifest that the use of the name of Mrs. Heath was merely as a means of describing the premises to be searched, not to charge her with theft. The allegations of the complaint sufficiently show that the warrant authorized the search of the appellant's place of residence and effects. The direction to search "in or about the house of Mrs. C. A. Heath" was sufficient to embrace the room of an inmate of her home. We have examined with care all of the authorities cited by the respondents in this connection, and we are satisfied that they are not controlling under the facts here pleaded. For example, in *Larthet v. Forgay*, 2 La. Ann. 524, 46 Am. Dec. 554, the court says:

"It appears by the testimony that under the same roof there were two dwellings. One, which was immediately at the corner of the streets named in the warrant, was occupied by one Marcel, who kept a cabaret there. The other was occupied by Larthet, who kept a cigar shop. The respective premises appear to have been distinct, the yards being divided by a fence, and a door by which the premises communicated being nailed up. After making search in the cabaret, and in the other apartments of Marcel's tenement,

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in one of which the breastpin was found, the officer, who was accompanied by Forgay, and appears to have acted under his instructions, proceeded to force the communication into the plaintiff's premises."

It is evident that in that case a separate establishment from that described was searched. The distinction from the facts here pleaded is plain.

But even if the warrant were held technically insufficient to authorize the search of the appellant's room and effects, it does not follow that respondents would not be liable to an action for malicious prosecution. The complaint alleges that the defendants directed the sheriff to search the room and effects of the appellant and Miss Loeffler and no other parts of the house. If, as alleged, the respondents, acting maliciously and without probable cause, directed the search, they became the moving cause of the injury and were responsible for it, though the officer exceeded his authority in following their direction. The essence of the injury resulting from a wrongful search is the unwarranted invasion of one's premises and property and the notoriety, suspicion, and disgrace incident to the imputation of crime thereby implied. It is manifest that the injury is the same whether the warrant be technically sufficient or not, and whether the officer exceeded his authority or not. The person urging forward the search cannot be heard to say that the officer should have disregarded his direction. As said by this court in *Kerstetter v. Thomas*, 36 Wash. 620, 79 Pac. 290, adopting the language of Justice Brewer in *Parli v. Reed*, 30 Kan. 534, 2 Pac. 635:

"Where a party files a complaint upon which he causes the arrest of another for an alleged crime, it is no defense to an action for malicious prosecution that the complaint was technically defective. So long as it was treated by the justice and officers as sufficient, and the defendant in fact arrested thereon, the party filing it is estopped from questioning its sufficiency."

While the case cited and the case quoted arose upon unlawful arrest, it is obvious that the same rule should apply in case of illegal search. In the case before us, the trial court expressed the opinion that verbal or even written directions of the defendants would not justify the officer in exceeding the authority of the warrant. The question here, however, is not one of official liability. An officer may be liable for exceeding the command of process, but that fact in no manner exonerates the instigator of the proceeding from liability for an unauthorized use of the process by his connivance and direction. While an officer may justify under a warrant good upon its face, though illegal in fact, the rule is different as to nonofficial instigators and abettors.

"But such is not the rule applicable to strangers or third persons, who are not required, in the exercise of a public duty, to assume the responsibility of executing legal process. If they interfere of their own motion, without authority or command from the officers of the law, to cause a writ or warrant to be enforced, they act at their peril; and if the process, though regular on its face and apparently good, was unauthorized, or was issued by a tribunal having no jurisdiction, or acting beyond the scope of its power, they are liable for the consequences arising from the enforcement of unlawful process. It is upon this ground that a party is held responsible, at whose suit execution is made, when the officer serving it incurs no liability. The rule is, that if a stranger voluntarily takes upon himself to direct or aid in the service of a bad warrant, or interposes and sets the officer to do execution, he must take care to find a record that will support the process, or he cannot set up and maintain a justification." *Emery v. Hapgood*, 7 Gray 55, 66 Am. Dec. 459.

The same principle is recognized in the following authorities: *Wallace v. Williams*, 14 N. Y. Supp. 180; *Gibson v. Holmes*, 78 Vt. 110, 62 Atl. 11, 4 L. R. A. (N. S.) 451; *McAlee v. Good*, 216 Pa. 473, 65 Atl. 934, 116 Am. St. 782, 10 L. R. A. (N. S.) 303; *Grimes v. Greenblatt*, 47 Colo. 495, 107 Pac. 1111; 25 Am. & Eng. Ency. Law (2d ed.), p. 150.

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"A party is liable when he authorizes, encourages, directs or assists an officer to do an unlawful act, or to do a lawful act in an unlawful manner, or to abuse, exceed, or disregard his duty or authority; as, for example, when he directs the service of void process, the arrest of a person privileged from arrest, directs the refusal of lawful bail, procures an arrest without process, or participates in the doing of any other act which the process or authority of the officer will not legally justify." Newell, *Malicious Prosecution*, p. 109.

It seems to us that, upon principles of natural justice and as sustained by both reason and authority, the respondents were liable for their own acts in directing the officer to make the search, without any regard to the sufficiency of the warrant as a protection to the officer. The case of *Ton v. Stetson*, 43 Wash. 471, 86 Pac. 668, does not militate against this view. There the complainant, Stetson, did not participate in nor direct the wrongful act of the officers. In fact, they proceeded contrary to his instruction in arresting Ton. They made no search as directed by Stetson.

The respondents further contend, and the court held, that the action will not lie because the appellant was not arrested nor her property seized. While it has been generally held that an arrest of the person or a seizure of property is essential to sustain an action for malicious prosecution growing out of civil causes, both reason and authority sustain the contrary rule in cases arising from criminal proceedings where maliciously instituted without probable cause. In such cases, as we have seen, the essence of the wrong is the unreasonable search of one's premises and property, carrying with it an imputation of theft or complicity therein.

"The theory of appellee's counsel that arrest of plaintiff's person or seizure of his property is essential to his right of action is unsound. Nor is it necessary to his action that he should have been expressly charged with the larceny of the alleged stolen goods. The essence of the wrong done to him was the unreasonable invasion of his home, which wrong was aggravated by the charge that stolen goods were there secreted—thus at the very least casting upon him the sus-

picion of complicity in larceny." *Krehbiel v. Henkle*, 142 Iowa 677, 681, 121 N. W. 378.

"There is a corresponding conflict of opinion as to whether actual interference with freedom of locomotion by arrest or imprisonment is essential to the maintenance of the action, based on a criminal prosecution. The doctrine of one group of cases is that there must be at least a technical arrest or imprisonment, and that it is not sufficient that an accusation of a criminal offense has been preferred before a magistrate, if the accused has not been apprehended or process served. The better and general opinion is in accordance with the general tendency to enlarge the scope of the action, that it may be maintained, although there had been no arrest or imprisonment or holding to bail." 26 Cyc. 12.

See, also, *Olson v. Tvete*, 46 Minn. 225, 48 N. W. 914; *Holmes v. Johnson*, 44 N. C. 44; 1 Ency. Plead. & Prac., § 1784.

It is also urged that the complaint was insufficient in that it failed to allege actual damage. The disgrace, humiliation and public suspicion caused by the search were amply pleaded. In actions for malicious prosecution, these are usually the chief elements of damage. They are sufficient to sustain a substantial recovery without allegation or proof of special pecuniary loss. *Charlton v. Markland*, 36 Wash. 40, 78 Pac. 132. We are of the opinion that the complaint stated a cause of action for malicious prosecution. The demurrers should have been overruled.

The judgment is reversed, and the cause remanded with direction to overrule the demurrers and, on completion of the issues, that the cause be tried.

DUNBAR, C. J., MOUNT, MORRIS, and FULLERTON, JJ., concur.



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[No. 10176. Department Two. June 15, 1912.]

**JAMES B. WOODWARD, *Appellant*, v. HERMAN LUTSCH *et al.*,  
*Respondents*.<sup>1</sup>**

**CHATTEL MORTGAGES—DEFAULT—FORECLOSURE—DECLARING WHOLE DEBT DUE.** A provision in a chattel mortgage that the mortgagee could take possession upon default in any payment, and immediately proceed to sell in the manner provided by law and pay the amounts provided in the notes, authorizes a foreclosure for the whole amount due when any part becomes due; and seizure on notice of sale is a sufficient declaration of intent to declare the whole debt due.

**SAME—DEFENSES—TENDER—SUFFICIENCY.** After seizure of mortgaged chattels and commencement of foreclosure, a tender must include accrued costs, including a reasonable attorney's fee stipulated for in the mortgage.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered September 30, 1911, upon findings in favor of the defendant, in an action to restrain the foreclosure of a chattel mortgage. Affirmed.

*Gill, Hoyt & Frye*, for appellant.

*Peterson & Macbride*, for respondents.

MOUNT, J.—The plaintiff was indebted to the defendant Herman Lutsch upon three promissory notes; one for \$1,000, due June 12, 1911; one for \$1,000, due December 12, 1911; and one for \$500, due May 31, 1912. These notes were secured by mortgage upon personal property. After the first named note became due and was not paid, the defendant Lutsch proceeded by notice under the statute to sell the mortgaged chattels in satisfaction of all three of the notes. After the sheriff had taken possession of the mortgaged property, the plaintiff brought this action to restrain the sale, alleging that the sum of \$1,000 only was due on the notes, and that a tender of this sum had been made. The defendant for answer to the complaint denied that any tender had

<sup>1</sup>Reported in 124 Pac. 393.

been made, and by cross-complaint set out the notes and mortgage; and alleged that, by reason of improper conduct of plaintiff in the management of the mortgaged property, the debt was about to become insecure and the value of the property about to become worthless, and also that the plaintiff had refused to pay one of the notes, and therefore the defendant elected to declare the whole debt due. The prayer was for a judgment for the amount of the notes, with interest, and a reasonable attorney's fee alleged to be \$250. The plaintiff, for answer to the cross-complaint, denied that defendant Lutsch was entitled to any attorney's fee, denied that the notes were due, and also pleaded a tender. The case was tried upon these issues, and the court entered a decree in favor of the defendant Lutsch for the full amount of the notes, with interest and costs and \$200 attorney's fees. The plaintiff has appealed.

When the case came on for trial, the plaintiff moved for a judgment on the pleadings, which motion was denied. After judgment, the plaintiff moved for a new trial, upon the ground of error of law and insufficiency of the evidence. This motion was also denied. These two rulings of the court are the only errors assigned upon this appeal. Appellant argues that there is no allegation in the answer or cross-complaint that the defendant had given notice of his intention to declare all of the notes due, and therefore the motion for judgment on the pleadings should have been sustained. The answer does not directly so allege, but it sets out the notes and the mortgage, which contain a provision as follows:

"It is also agreed that if the mortgagor shall fail to make any payment as in said promissory notes provided, then the mortgagee may take possession of said property, using all necessary force to do so, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the amount in said notes provided, together with an attorney's fee of a reasonable amount."

This provision was sufficient to warrant a foreclosure of the

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mortgage for the whole amount due when any part of the debt became due. *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 Pac. 900, 126 Am. St. 856, 15 L. R. A. (N. S.) 590. The seizure of the property on notice of sale was a sufficient declaration of defendant's intention to declare the whole debt due.

It is next argued that the court erred in refusing the new trial because a tender had been made of the amount due on the first note. This tender, if any was made at all, was made after the commencement of the foreclosure by notice and sale. A tender at that time to be sufficient must have included the reasonable cost incurred, including a reasonable attorney's fee, because the mortgage so provided. *Reisan v. Mott*, 42 Minn. 49, 48 N. W. 691; *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335, 47 N. W. 1072. It is not claimed that the amount tendered included any accrued costs in the foreclosure proceeding. The tender, if made at all, was therefore insufficient. *Thomas v. Seattle Brewing & Malting Co.*, 48 Wash. 560, 94 Pac. 116, 125 Am. St. 945, 15 L. R. A. (N. S.) 1164.

There is no error and the judgment is therefore affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10153. Department One. June 17, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE  
ELLIOTT, *Appellant*.<sup>1</sup>

CRIMINAL LAW—FORMER JEOPARDY—SEPARATE TRIAL. Where a plea of not guilty and of former jeopardy are entered before the commencement of the trial, it is discretionary to direct that they be tried together.

SAME—IDENTITY OF OFFENSES. A conviction for obtaining money under false pretenses, the gist of the offense resting primarily in securing credit for a false name, cannot be pleaded in bar of a prosecution for the forgery of an insurance policy, which was incidental to the other offense and arose out of the same transaction; since the crimes are separate and distinct, the false name being the essence of the first, and the uttering of spurious security, of the second.

FORGERY—INSTRUCTIONS. An instruction that the mere uttering of a forged instrument is a circumstance tending to show knowledge of its falsity, is not prejudicially erroneous when immediately explained to mean that if the jury find that if it was forged and uttered by the defendant or his codefendant with his assistance, then the jury could consider these facts in determining whether the defendant knew it was forged at the time it was uttered.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 30, 1911, upon a trial and conviction of forgery. Affirmed.

*William R. Bell*, for appellant.

*John F. Murphy, Hugh M. Caldwell, and H. B. Butler*, for respondent.

Gose, J.—The information charges the defendant with the crime of forgery in the first degree, committed by uttering as true, to one George E. Johnson, on the 17th day of July, 1911, a certain forged policy of insurance with intent to defraud. The defendant was found guilty by the jury, and has appealed from the judgment entered upon the ver-

<sup>1</sup>Reported in 124 Pac. 212.

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dict. The record shows that the appellant entered a plea of not guilty on September 16, 1911, and that on September 27 he filed a written plea, wherein he alleges, in substance, that he was convicted of the same offense on September 26. The state joined issue on the plea.

The court denied the application of the appellant for a separate trial upon his plea of former jeopardy. This is assigned as error. This plea was filed after the entry of the plea of not guilty and on the day the trial commenced. Where both pleas are entered before the commencement of the trial, the court may, in its discretion, direct that they be tried together. We think the learned trial court gave a sound interpretation to the statute. Rem. & Bal. Code, § 2108. This view is in harmony with the practice in this state. *State v. Reiff*, 14 Wash. 664, 45 Pac. 318; *State v. Campbell*, 40 Wash. 480, 82 Pac. 752. Moreover, the assignment raises simply a question of practice, and the appellant was not prejudiced by the ruling of the court.

The information in the first case, upon which the plea of a former conviction is predicated, charged the defendants with the crime of grand larceny, in that they acquired the possession of a certain automobile by fraudulently and falsely representing to George E. Johnson that the true name of the defendant Joseph T. Dyer was John A. Arnold. The history of that case is fully set forth in *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089. In support of the plea of former conviction, the appellant offered evidence which shows that the two offenses were committed at the same time; that George E. Johnson is the complaining witness and the party defrauded in both cases; that in the former trial the state put in evidence a mortgage and an abstract of title to land embraced in the mortgage, but that it did not offer the insurance policy in evidence. It is further shown that the four papers, the mortgage, note, abstract and insurance policy, were delivered to Johnson as security for the payment of the automobile. The note and mortgage purport to

have been executed by one Oscar B. Lemps, in favor of one John A. Arnold. The policy, which purports to cover the buildings on the property, was issued to Oscar B. Lemps, and provides that the loss, if any, shall be paid to John A. Arnold as his interest may appear.

From the facts stated, it will be observed that in the first case the appellant was charged with the crime of obtaining goods by means of a false pretense, the pretense being that Dyer was Arnold. In the case at bar, he is charged with knowingly uttering a forged instrument with intent to defraud. The evidence shows that the four papers, the mortgage, note, abstract, and policy, constitute in fact one security and were uttered at the same time. Upon these facts, the appellant contends that the transaction was single and indivisible and constituted only one crime. In the first case, it was contended that Johnson parted with his property, not upon the credit of the name Arnold, but upon the credit of the securities; that their falsity was not alleged in the information; and that, therefore, the conviction was erroneous. In disposing of that contention in the former case, we said that "the gist of the offense lies in establishing the name, and the pretenses and tokens used to establish credit for the name are but incidents." While the evidence shows that there was but one transaction, it is obvious that the crimes are not identical. The first case rests primarily upon securing credit for a false name. This case rests upon knowingly uttering a false instrument with intent to defraud. There is not a complete identity of facts in the two cases. The element of a false name (the gist of the former offense) does not enter into this case. Moreover this court is firmly committed to the view that, to sustain the plea of former jeopardy, the offenses must be identical in both fact and law. *State v. Reiff*, and *State v. Campbell, supra*. In the *Campbell* case, this court said that the test is, "not whether the defendant had already been tried for the same act, but whether he had been put in jeopardy for the same offense." The same

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rule is announced in the following cases from other jurisdictions: *Morey v. Commonwealth*, 108 Mass. 433; *State v. Caddy*, 15 S. D. 167, 87 N. W. 927, 91 Am. St. 666; *People v. Majors*, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; *State v. Stewart*, 11 Ore. 52, 238, 4 Pac. 128; *People v. Bentley*, 77 Cal. 7, 18 Pac. 799, 11 Am. St. 225; *Territory v. Stocker*, 9 Mont. 6, 22 Pac. 496.

The two crimes are made separate and distinct by our statute. The false name was of the essence of the first offense, and the uttering of the spurious security is of the essence of the second offense. If the state should seek to split the securities and make each of them the basis for a separate prosecution, the appellant's argument would be sound. In such case there would be an identity of act and offense.

The court instructed the jury as follows:

"You are instructed that the mere uttering, that is, the passing of a forged instrument, is of itself a circumstance tending to show knowledge of its falsity, which you may consider in determining this case. I mean by that, if you find from the evidence that this forged policy of insurance described in the information was forged, that is, falsified, and you further find that it was uttered, that is, passed by the defendant now on trial, or by his codefendant Dyer, with the aid and influence of the defendant now on trial, then you have a right to consider these facts in determining whether or not the defendant now on trial knew that it was forged at the time it was uttered."

Error is assigned to this instruction. If the first sentence of the instruction stood alone, there would be merit in the assignment. But as qualified we think it is a correct statement of the law. *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735; *State v. Peebles*, 65 Wash. 673, 118 Pac. 906; *State v. Bliss*, 27 Wash. 463, 68 Pac. 87.

Finding no error in the record, the judgment is affirmed.

DUNBAR, C. J., CROW, PARKER, and CHADWICK, JJ.,  
concur.

[No. 10269. Department One. June 17, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. G. G. GAMBER,  
*Appellant*, HERBERT MATSON, *Defendant*.<sup>1</sup>

ROBBERY—EVIDENCE—SUFFICIENCY. A conviction of robbery is not sustained where there was no evidence that the defendant participated in the crime or aided or abetted therein or in a conspiracy to commit it, other than the fact that he joined the others a short time previously and said "get him" when the victim started to run away.

DUNBAR, C. J., dissents.

Appeal from a judgment of the superior court for King county, Gay, J., entered January 20, 1912, upon a trial and conviction of robbery. Reversed.

*John W. Whitham*, for appellant.

*John F. Murphy, Crawford E. White, and Reah M. Whitehead*, for respondent.

Gose, J.—The defendants were jointly charged, tried, and convicted of the crime of robbery. The defendant Gamber has appealed.

At the close of the state's case, the appellant moved for a directed verdict. The denial of this motion constitutes the principal assignment of error. The state's case shows that the complaining witness, Wolfe, was drinking in a saloon on Yesler way, in the city of Seattle, at about eight o'clock on the evening of the robbery; that he then exhibited a considerable sum of money; that the defendant Matson was then in the saloon, but not drinking with Wolfe; that the appellant was not in the saloon; that Wolfe left the saloon in a drunken condition, between 8 and 8:30 p. m.; that Matson left a few minutes later, and joined Wolfe on First avenue, about two blocks north of Yesler way; that they traveled north on First avenue about ten blocks, when they were

<sup>1</sup>Reported in 124 Pac. 210.



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Opinion Per Gose, J.

joined by the appellant; that Matson had arranged to take Wolfe to Fourth and Pike streets, and that the three continued to travel north a distance of ten or twelve blocks, when Wolfe was knocked down and robbed.

Wolfe testified that Matson came up to him and said, "Where you going, kid?" that he answered that he was going to Fourth and Pike streets; that Matson said, "I am going up that way. I will show you the place;" that he—Wolfe—was unacquainted with the city, but that he could get his bearing at that point. The state's evidence further shows that Wolfe was not acquainted with either of the defendants; that the appellant did not strike or touch Wolfe, but that the latter was assaulted and knocked down by Matson. Wolfe further testified that he finally realized that he was "in a strange part of town;" that he knew his money was not safe; that he turned to leave the defendants; that the appellant then said, "Get him;" that he then started to run and to call for help; that when he had run about a half block, Matson overtook him, struck him, and knocked him down. A Mr. Rudd, a policeman, testified that he heard the call for help and hastened to the scene; that, when he reached there, he found six or eight people, including both defendants; that Matson "was all over mud;" that he asked Wolfe where he had been robbed, and that he answered, "Over there;" that the appellant then said that Wolfe had been robbed in the alley, and that they went to the alley, and some one (he did not remember who) picked up \$100 in twenty-dollar gold pieces and gave to the witness. Later in the evening Matson was arrested, and two muddy twenty-dollar gold pieces were found secreted in his sock. Wolfe further testified that he met the appellant the next day, and that the latter said to him, "You got pretty badly beaten up, didn't you?" that he said, "Yes," and that the appellant then said that he did not rob him; that he had plenty of money and did not have to steal; that the witness asked the appellant if he would know Matson; that he answered, "Yes;"

that witness then said he would like to have an opportunity to talk with him, and that the appellant then said, "Wait until I have a shave and a shine, and I will take you to where he hangs out and talk to him;" and that the witness then got an officer and had the appellant arrested.

It will be observed that there is no testimony tending to show that the appellant aided in or abetted the robbery. If the conviction is permitted to stand, it must rest upon a conspiracy between the defendants to commit the crime. Of this there is no evidence. The appellant joined the complaining witness and Matson on First avenue, about 8:30 in the evening, at about the intersection of First avenue and Pike street. There is no evidence that this meeting was the result of a preconcerted plan between the defendants. Indeed, the inference is clear that it was not. Matson was then proceeding with Wolfe to the point where the latter desired to be taken. There is no evidence that the appellant knew that Wolfe had money on his person. If the appellant had conspired with Matson to decoy the complaining witness to a secluded place and there rob him, he would no doubt have joined in the robbery. The appellant knew Matson, but there is no evidence that they were intimates, or indeed that they had ever been seen together. They are all young men, and the mere fact that the appellant joined them, walked with them, and said "Get him," is not sufficient to support a judgment of conviction. It shows neither an aiding and abetting nor a conspiracy. The appellant took the witness stand and denied that he said anything, except to point out to the policeman the place where the trouble began. In view of the fact that no money was found upon the appellant, that he did not participate in the commission of the crime, and that there is nothing in the record which reaches the dignity of evidence tending to show a common criminal design or conspiracy between the defendants, the conviction cannot be permitted to stand. While we adhere to the rule, so often announced by this court, that the jury are the

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Statement of Case.

exclusive judges of the facts, there must be some evidence to support a conviction. We are always reluctant to disturb the verdict of a jury, but we feel that we would be recreant to duty if we permitted a judgment of conviction to rest upon such a fragment of evidence. It is important to the state that the guilty be punished, but it is more important that a citizen be not deprived of his liberty unless there be some evidence to justify it. We find no such evidence in the record. The motion for a directed verdict should have been sustained.

The judgment is reversed, with directions to dismiss the case.

PARKER, CROW, and CHADWICK, JJ., concur.

DUNBAR, C. J., dissents.

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[No. 10465. Department One. June 18, 1912.]

A. E. HEATH, *Respondent*, v. SEATTLE TAXICAB COMPANY,  
*Appellant*.<sup>1</sup>

APPEAL—RECORD—STATEMENT OF FACTS—SETTLEMENT—REFERENCE. Where, upon the settlement of a proposed statement of facts, to which no amendments were proposed, an issue of fact arises between the judge and counsel as to what occurred at the trial, the supreme court will order a reference to another judge to take evidence and report his findings.

Application filed in the supreme court June 5, 1912, for an order of reference to settle the facts to be certified on appeal from a judgment of the superior court for King county, Tallman, J. Granted.

*Longfellow & Fitzpatrick*, for appellant.

*Brightman & Tennant*, for respondent.

<sup>1</sup>Reported in 124 Pac. 217.

**PER CURIAM.**—A judgment was rendered in the lower court against defendant, and notice of appeal given. Thereafter and within time a statement of fact was filed and served upon the attorneys for the plaintiff. No amendments were proposed, and on the 9th day of May, 1912, defendant's counsel presented the statement to the court, and requested that it be certified as the statement of facts on appeal. Thereupon the trial judge refused to certify the statement as proposed, and upon his own motion and over the protest of the defendant, made an addition to the proposed statement as follows:

“During the progress of the trial in this case, in open court but not within the hearing of the jury, the court read to Mr. Longfellow, counsel for the plaintiff, and Mr. Tenant, counsel for the defendant, the following instruction:

“ ‘The ordinance of the city of Seattle regulates the speed of automobiles and taxicabs at the place this accident is alleged to have occurred, and that they be run at a speed not to exceed twelve miles per hour, and that in crossing at the intersection of Fremont avenue and Ewing street in said city, the speed be not to exceed eight miles per hour, and if, from the evidence, you find that the driver of said taxicab, at the time and place mentioned in the complaint, ran his cab at a greater rate of speed than that allowed by the said ordinance, he was guilty of negligence.’

“After reading the same to the said counsel, the court asked both of them if the said instruction stated the law correctly as to speed limits involved in and applicable to the case on trial. Both said counsel said it did. The court also asked them if they were satisfied with the instruction as read to them and they both answered in the affirmative. The court relied upon the fact that both said counsel so agreed as to the said instruction stating the law correctly, as aforesaid, and gave the same to the jury without further investigation.”

Defendant comes to this court asking for an order of reference to settle the dispute which has arisen between it and the court as to the correctness of the addenda to the certificate. That a trial judge has the right to make the

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statement conform to the facts occurring at the trial, there can be no doubt. *State ex rel. Hofstetter v. Sheeks*, 63 Wash. 408, 115 Pac. 859; *Id.*, 65 Wash. 410, 118 Pac. 308. But where no exception is made by opposing counsel, and no amendments are proposed, we think that it would be going too far to hold that the trial judge has the right to change the statement so materially as to affect the merit of the appeal, as was done in this case, and thus deprive the party appealing of all remedy and opportunity to be heard. It will be noticed that the addition to the certificate does not purport to add to the testimony of any witness or to take away therefrom, but raises directly an issue of fact between the trial judge and counsel. The statute furnishes no procedure in a case of this kind, but we have had to deal with the same condition in one or more unreported cases. We there met the situation by referring the issue to another judge to inquire into and report the fact to us, and it is our order that it be so in this case.

It is therefore ordered that the record in this case be forwarded to the Honorable Walter P. Bell, judge of the superior court for the state of Washington in and for Snohomish county, and that he be directed to go to King county and there take evidence and hear such witnesses as may be offered on behalf of either the trial judge or counsel, and that he return to this court his findings and conclusions.

[No. 9803. Department One. June 18, 1912.]

EMIL HENDRICKSON, *Appellant*, v. SIMPSON LOGGING  
COMPANY, *Respondent*.<sup>1</sup>

MASTER AND SERVANT—SAFE APPLIANCES—PROMISE—ASSUMPTION OF RISKS—QUESTION FOR JURY. It is for the jury to determine whether there was contributory negligence, and whether the servant could rely on a promise, where it appears that the foreman in a lumber camp promised to furnish the plaintiff, employed in sawing trees, with an undercutter rigging for making undercuts, that the appliance would have rendered his work safer, that he relied on the promise, and was injured while attempting to cut up two logs as directed, being unable to make the cut of the lower log first for want of the rigging.

SAME—PROMISE—REASONABLE TIME—QUESTION FOR JURY. In such a case, it is for the jury to say whether the lapse of three or four days after the promise was a reasonable length of time in which plaintiff might rely thereon.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, it is for the jury to say whether plaintiff was guilty of contributory negligence in failing to block the log that rolled on him, in failing to cut the log as marked, or in not adopting the proper avenue for escape, where there was evidence that he blocked the log, and considered it safely blocked, but some of the supports fell, that he used his judgment in making the cut, and in endeavoring to escape he was compelled to act hurriedly.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 5, 1911, upon granting a nonsuit, dismissing an action for personal injuries sustained by a logger. Reversed.

*Frank E. Green* and *Brady & Rummens*, for appellant.

*Roberts, Battle, Hulbert & Tennant*, and *Charles F. Munday*, for respondent.

CROW, J.—This action was commenced by Emil Hendrickson against Simpson Logging Company, a corporation, to recover damages for personal injuries. From a nonsuit and judgment of dismissal, the plaintiff has appealed.

<sup>1</sup>Reported in 124 Pac. 395.

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Opinion Per Crow, J.

The question presented for our consideration is whether the trial court erred in sustaining respondent's motion for a nonsuit. Appellant was employed as a buckner in respondent's logging camp. After trees have been felled, it is the duty of a buckner to saw them into logs. It frequently happens that trees fall across one another, forming what is known as a jackpot. A number of trees may fall in a single jackpot. One of the tools with which appellant claims a buckner should be provided is an undercutter rigging. When trees are in a jackpot, the proper method of procedure is to first cut the lower tree, and then the upper one. This lessens the liability of an upper log rolling or falling upon the workman while he is engaged in cutting the lower tree. The cut of the lower tree is ordinarily made by sawing it from the upper side; but when its position produces a strain which pinches the saw, it is sawed from the under side by what is known as an undercut. To make an undercut it is necessary to have some appliance to support the moving saw, which is then operated teeth upward. The appliance which appellant contends is ordinarily used is known as an undercutter rigging. Having no undercutter rigging, appellant requested respondent's foreman to provide one, complaining that his work in a jackpot of large trees without one was unsafe and dangerous. The foreman told appellant to proceed with his work, and promised that he would give him an undercutter as soon as one could be procured. Appellant did so, relying on this promise, and within three or four days was injured by a rolling log. These facts, and others hereinafter mentioned, appear from the evidence.

Appellant alleged that respondent promised to procure the undercutter for him; that, relying upon such promise, he proceeded with his work; that on or about September 19, 1910, while he was engaged in bucking a jackpot of large trees, and by reason of having no undercutter to use in sawing, a log rolled upon and against him, inflicting the in-

juries of which he complains. Respondent pleaded the defenses of assumption of risk and contributory negligence.

In deciding whether the nonsuit was properly granted, we must consider the evidence most favorably for appellant. It is elementary that a duty devolves upon the master to provide his servant with reasonably safe tools and appliances with which to perform his work. The evidence in this case shows that an undercutter rigging was a proper and safe appliance to be used in making the undercut; that in case of a jackpot, it lessened dangers to which a buckler would otherwise be subjected, in that it enabled him to make an undercut in a jackpot in which trees might be so situated that an undercut could not be safely made without such an appliance. The evidence further shows that appellant was injured in the following manner: He was working in a jackpot in which one large tree was lying across and resting upon another, and also upon other timbers, such as windfalls. The trees had been marked by a marker, who thus indicated points at which they were to be cut into logs. The buckler had the privilege of changing these cuts to other points, provided he produced logs of stipulated lengths, and would occasionally make such changes to facilitate his work. While appellant was working on the jackpot in question, respondent's foreman told him to complete the work of sawing both trees. Appellant first sawed the under tree, making all cuts except one which was marked near the point where the upper tree rested upon the lower one. Appellant could not change the cut from this mark because of a defect in the tree which would have made the log of forbidden length. He attempted this last cut on the lower tree by sawing from above, but his saw was pinched by pressure from the upper tree. For the want of an undercutter, he could not make an undercut. There was evidence that a buckler sometimes uses an axe handle or a piece of timber to support the saw, as a substitute for an undercutter; but appellant testified that he could not adopt such a substitute, as the tree was so close to another



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log and so large that he could not place his axe handle in proper position; that he could not use any available timber, as it was too soft for a cut of that size; that an undercutter rigging, which he did not have, was the only appliance which would hold his saw in position; and that having no such appliance he abandoned the lower tree and proceeded to cut the upper one. The marker had indicated a cut on the upper tree just above the point where it rested on the lower one, but appellant using his judgment cut it at another point, making a longer log. He then tried to roll the upper log from the lower tree to further relieve the strain, but could not do so. Thereupon he blocked the upper log to prevent it from moving, and proceeded with the cut on the lower tree, which to some degree had then been relieved of the pressure of the upper tree. While thus engaged, the upper log unexpectedly rolled upon and injured him before he could make his escape.

Appellant insists that, with the promised undercutter, he could have made the last cut on the lower tree before cutting the upper one; that, had he done so, the upper tree would not have rolled, that he would not have been subjected to the added danger, and that he would not have been injured. On this evidence we conclude the cause was for the jury, and that the motion for a nonsuit should have been denied. It was for the jury to determine whether the promise was made, and whether appellant was guilty of contributory negligence sufficient to preclude a recovery.

Respondent contends that the evidence shows appellant knew of the danger incident to his employment and assumed the risk. This would be true if he had proceeded in his work without an undercutter rigging and without protest or objection, but he complained to the master, called attention to the extra hazard to which he was subjected, and requested that an undercutter be provided. Thereupon the master made the promise, and appellant, relying upon that promise, proceeded with his work. Under such circum-

stances, the master assumed the risk of appellant's careful use of the appliances he then had, during such reasonable time thereafter as might be needed to procure the promised undercutter. It was for the jury to determine whether a reasonable time had elapsed and whether appellant, while relying upon the promise, exercised due care in the performance of his work, and in using the tools and appliances he then had. *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359; *Shea v. Seattle Lum. Co.*, 47 Wash. 70, 91 Pac. 623; *Cook v. Pittock & Leadbetter Lum. Co.*, 51 Wash. 316, 98 Pac. 1130; *Alkire v. Myers Lum. Co.*, 57 Wash. 300, 106 Pac. 915; *Myhra v. Chicago, Milwaukee & P. S. R. Co.*, 62 Wash. 1, 112 Pac. 939.

Respondent, however, contends that there are a number of devices ordinarily used by buckers when making an undercut; that the most usual is to drive an axe blade into the tree and rest the back of the saw upon the axe handle; that small wheels attached and adjusted to the axe handle are sometimes used, but that the axe handle itself is the most common device, and one which appellant then had and could have used. There is no contention that appellant had any of these appliances other than an axe handle. The evidence is sufficient to sustain a finding that, while an axe handle may ordinarily be used in undercutting logs from smaller trees, conditions in a jackpot frequently occur when it cannot be used in cutting large trees such as those upon which appellant was engaged. An undercutter rigging, such as appellant contends would then be necessary, was introduced in evidence, and is now before us as an exhibit. We need not describe it, but its construction and the evidence indicate that it could be used in the jackpot under conditions where an axe handle or other device would not be practicable.

Respondent contends that its failure to provide the undercutter was not the proximate cause of the accident, that the proximate cause was appellant's contributory negligence, and that appellant should be precluded from recovering because

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of his negligence in the following particulars: (1) That he did not brace and block the upper log with sufficient safety to prevent it from rolling upon him; (2) that he did not cut the upper log as indicated by the marker; and (3) that when the log started to roll he did not select the proper avenue of escape. The evidence is that appellant did block the log; that he considered it well and safely blocked; that some of the supports fell while he was making the last cut on the lower tree; that the log then rolled and injured him; that in making the cut at a point not indicated by the marker, appellant used his judgment, thinking the upper log would then roll, and to a greater extent relieve the strain upon the lower tree; that it did not roll; that, finding he had made a mistake in judgment, he blocked it, as he believed safely and well; and that when he attempted an escape he was compelled to act hurriedly, and would have succeeded had he not been caught between a large stump and the rolling log. The evidence upon which respondent relied to sustain its defense of contributory negligence is not so clear, convincing, and undisputed that appellant should be held negligent as a matter of law. The issues involved were for the jury.

The judgment is reversed, and the cause remanded for a new trial.

CHADWICK, PARKER, and GOSE, JJ., concur.

[No. 9933. Department One. June 18, 1912.]

HENRY GILCHER, *Respondent*, v. SEATTLE ELECTRIC  
COMPANY, *Appellant*.<sup>1</sup>

CARRIERS—INJURIES TO PERSONS ON TRACK—EVIDENCE—INSTRUCTIONS. In an action for injuries by one run over by a street car, where plaintiff, who had been drinking, claimed that he was knocked down by a west-bound car and thrown across parallel tracks and run over by an east-bound car while unconscious from the first accident, and there was no other evidence as to how he came to be on the tracks, or that he could have been discovered in that position in time to stop the east-bound car, the defendant is entitled to an instruction that it is not liable if the jury find that the first accident did not happen.

SAME—LIABILITY. In such a case, the fact that the headlight on the east-bound car was obscured, so that the motorman could not see ahead as far as usual, would not render the company liable in the absence of evidence that the plaintiff had been on the tracks a sufficient length of time to have been discovered.

SAME—LAST CLEAR CHANCE. In such a case, the doctrine of the last clear chance does not obtain.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 15, 1911, upon the verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a passenger knocked down and run over by street cars. Reversed.

*James B. Howe* and *A. J. Falknor*, for appellant.

*Robert W. Jennings*, for respondent.

CROW, J.—This action was commenced by Henry Gilcher against Seattle Electric Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

Appellant owns and operates a double track cable street railway, in the city of Seattle, for a distance of thirty blocks or more on Yesler avenue, from Pioneer square on the west,

<sup>1</sup>Reported in 124 Pac. 218.

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to Lake Washington on the east. West-bound cars are operated on the northerly track and east-bound cars on the southerly. Respondent in substance alleged that, on October 1, 1910, he signaled a west-bound car near 27th street, indicating his intention to become a passenger; that the gripman stopped a short distance west of the street intersection; that respondent attempted to board the car; that while he was doing so the gripman negligently, suddenly, and without warning started the car; that respondent was thereby thrown with great force to the street pavement over and across the southerly track; that he sustained severe injuries about his head, which immediately rendered him unconscious and placed him in a position of imminent danger; that appellant's servants in charge of the west-bound car made no effort to ascertain what had become of respondent, but left him in his dangerous position; that while he was thus lying across the southerly track in an unconscious condition, one of appellant's east-bound cars passed over him, causing the injuries of which he complains; that his position of danger ought to have been known to, or discovered by, appellant, had it observed due care in the equipment and operation of its west-bound car; that appellant was negligent in failing to see that a careful watch or lookout was maintained by its gripman in charge of the west-bound car, and in failing to see that the car was equipped with an unobstructed headlight or with a suitable fender.

Appellant pleaded the defense of contributory negligence; affirmatively alleging that, on the night of October 1, 1910, while it was raining, and at a very dark place between 26th and 27th avenues on Yesler way, respondent, without warning to appellant, either fell or lay down upon or near the track over which appellant's east-bound cars were operated, and that respondent was then intoxicated. The answer also denied all allegations of negligence pleaded in the complaint.

The undisputed evidence shows that respondent, a man about fifty-six years of age, had resided in Alaska for many

years; that he was in Seattle on a brief visit; that about nine or ten o'clock on the evening of October 1, 1910, in response to a telephone message, he went to a dwelling house near 27th avenue, on the south side of Yesler street, to call upon a woman whom he had known for many years; that another woman was at the house; that during the day respondent had taken several drinks of whiskey and port wine; that he took two more such drinks while at the house; that later in the evening one of the women telephoned into the city for a lunch consisting of oysters, crackers, and several bottles of beer, which was delivered by a messenger boy; that the messenger boy left the house first; that respondent left about twenty or thirty minutes later; that about 1:20 a. m., an east-bound cable car, operated on the southerly track, ran over respondent, cutting off his left foot and the toes of his right; that he was then lying south of the southerly track with his feet across the rail; that neither the gripman nor any other person saw him until the car was within five or six feet of him; that the length of the car was from thirty-five to forty feet, and that it could not be stopped within less than half its length. On other points the evidence was conflicting.

It will be noted that respondent claims (1) that, when attempting to board the west-bound car, he was, by reason of appellant's negligence, thrown upon the pavement and across the southerly track, where he was left in an unconscious condition; (2) that, while he was still there, an east-bound car ran over his feet and injured him. In the briefs these two alleged accidents are called the first and second accidents, and we will thus mention them.

On the trial appellant vigorously contended that the first accident never happened. Its evidence strongly indicated that respondent did not leave the dwelling house until after the last west-bound car had gone into the city. The gripmen, conductors, and others on the last two cars, and the messenger boy, who rode in on the last car, testified that the

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first accident did not occur; while respondent as positively testified that it did. The evidence on this question, although conflicting, seems to preponderate in appellant's favor, yet the issue involved was for the jury. It is conceded that, at the instant the east-bound car ran over respondent's feet, he was lying just south of the track with his feet across the south rail. If he had in fact been thrown and left there in an unconscious and helpless condition by reason of appellant's previous negligence involved in the alleged first accident, it would necessarily follow that appellant would be liable for the damages sustained from both the first and the second accident. On the other hand, if the first accident did not occur, then appellant was in no way responsible for respondent's perilous position at the instant of the second accident; and any liability upon its part would have to be predicated upon some act of negligence not involved in the alleged first accident. Appellant, in substance, requested the trial court to instruct the jury that, if they found the first accident did not occur, they must find for appellant. This instruction was refused, and upon its refusal, appellant assigns error. Although the issue of the first accident was for the jury, we cannot, from the general verdict, conclude whether they did or did not find that it had occurred. It may have been that their verdict was based on the second accident only. The trial judge, when passing upon the motion for a new trial, gave expression to his views in the following language:

"The only trouble in this case is this; there is not a human being on earth apparently that knows how that man got on that track. That is the only trouble there is in it. There is no question in the world that he had drunk a little liquor in this house on this night that he was hurt, and that he went out of that house and got on some kind of a car line, and the only evidence that really is positive on earth is that he was found bleeding and mangled and hurt and injured and terribly injured. . . . I became fully convinced on this trial the man didn't attempt to come on what we call the inbound

train. . . . I became convinced of that as a physical fact. Now, how he got on the other car line, you know, the out-bound car line, whether it was because he was drunk, I couldn't tell. If I had been a jurymen I couldn't have told. . . . This court doesn't believe that the plaintiff in this case ever attempted to come into town on that inbound car. I mean that he ever got on board of it. . . . I cannot figure it out by the physical facts."

Were we to assume, what may have been the fact, that the first accident did not occur, and that the jury would have so found, then in passing upon the propriety of the instruction requested and refused, it would become necessary for us to inquire whether the second accident alone would sustain a recovery under the evidence. There was evidence which, although disputed, was sufficient to sustain a finding that respondent was badly intoxicated at the time of his injury. He was lying on the street on a rainy night midway between two cross-streets, with his body angling to the south and west and with his feet upon the track. He was not seen by the gripman in time to stop the car. No other person had previously seen him on or near the track. If the first accident did not occur, no one has told how he came to be there, or how long he had been there. With the first accident eliminated, appellant was neither directly nor indirectly responsible for his position, and would not be liable unless it was guilty of some negligent or wrongful act after it actually discovered him, or which prevented his timely discovery.

It is contended that the headlight on the west-bound car was obscured by a sign which had fallen over it. We think the evidence shows that it was not thus obscured prior to the accident, but that the car in passing over respondent's legs sustained a severe jolt, which caused a signboard to be shaken from its position and to some extent obscure the headlight. Assuming, however, that the headlight was thus obscured before the accident, and that the gripman could not see as far as he would had it been in proper condition, yet



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there is no evidence showing how long respondent's feet had been upon the track. For all that appears, he may have been lying upon the street and may have rolled or moved upon the track just before the car passed. Or he may have fallen upon the track just about that time. There is an utter absence of evidence sufficient to sustain a finding that his feet were upon the track at any time prior to the instant he was first seen by the gripman and a passenger who stood on the front end of the car. It is undisputed that he was then only six feet ahead of the car. There is no contention that the car was operated at an excessive or dangerous rate of speed, nor was there any evidence that the fender was not a suitable one as alleged in the complaint. With the first accident eliminated, the only negligence which respondent urges is that the headlight was obscured. His contention is that, had it been in proper condition, the gripman's view would have extended further along the track; that he could then have seen respondent a distance of forty or fifty feet; and that he could have stopped the car in time to have avoided the accident. The difficulty with this contention is that it assumes respondent had been upon the track a sufficient length of time to have been seen before the car came too close to be stopped. Such a finding by the jury would have been the result of surmise and speculation as to when appellant lay down, rolled upon, or fell upon the track. Respondent urges the last chance doctrine to fix appellant's liability. But that doctrine has no application to the evidence before us, as it does not appear that the gripman did see, or in the exercise of due care could have seen, respondent in time to stop the car. On all the evidence, we conclude that, with the first accident eliminated, the circumstances of the second accident do not show any negligence for which the appellant would have been liable. The instruction requested should therefore have been given, and its refusal constituted reversible error.

Other assignments need not be discussed, as they will not

be material upon a retrial. The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., PARKER, GOSE, and CHADWICK, JJ., concur.

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[No. 10257. Department One. June 18, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. LUDOVIC  
DALLAGIOVANNA, *Respondent*.<sup>1</sup>

PERJURY—FALSE OATH—ADMINISTRATION—AUTHORITY OF NOTARY. Under Rem. & Bal. Code, § 8298, authorizing a notary public to take depositions and affidavits and administer all oaths required by law to be administered, a notary cannot, unless it is required by law, administer an oath with such binding force as is necessary to support a charge of perjury, in case of a false sworn statement.

PERJURY—FALSE OATH—POWER AND JURISDICTION OF TRIBUNAL—INVESTIGATING COMMITTEE. Since perjury can only be predicated on a false oath in a proceeding of which the tribunal had jurisdiction, an indictment is insufficient where its basis is a false oath before a committee authorized by resolution of a city council "to investigate and probe charges made by the acting mayor," without showing against whom the charges were made or that the matter was within the council or its jurisdiction.

Appeal from a judgment of the superior court for King county, Ronald, J., entered March 11, 1912, dismissing a prosecution for perjury, upon sustaining a demurrer to an indictment. Affirmed.

*John F. Murphy* and *H. B. Butler*, for appellant.

*Vanderveer & Cummings*, for respondent.

PARKER, J.—This is an appeal by the state from an order of the superior court for King county sustaining appellant's demurrer to an indictment found against him by the grand jury in that court, charging him with perjury in the second

<sup>1</sup>Reported in 124 Pac. 209.

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degree. The following is all of the language of the indictment requiring our attention:

"On the 26th day of September, A. D. 1910, the city council of the city of Seattle duly and regularly passed a resolution; and, on the same day, the same was duly filed as required by law, which said resolution was as follows:

"Be it resolved by the city council of the city of Seattle:

"That, whereas, it appears that during the absence of H. C. Gill, mayor of the city of Seattle, one of our members, elected by this body as the acting president, has been required under the charter of the city of Seattle to assume the important office of acting mayor, and

"Whereas, the said member has, during such incumbency in that office, endeavored to subordinate the vicious element of the city to the rule of law, and by strict enforcement of the ordinances of the city has, as far as possible within the time at his command, done much to restore the city to a state of order and cleanliness, and

"Whereas, in his effort to enforce the laws, he is reported to have found conditions which indicate the existence of corruption on the part of certain persons connected with the administration of civic affairs, now, therefore,

"Be it resolved, That we commend Mr. Max Wardall, acting mayor, for the vigorous and courageous stand he has made to bring about better conditions in the city, and pledge him the sympathy and support of this body, of which he is a member. And furthermore,

"Be it resolved, That, in furthering that end, a committee of five be appointed by this council to investigate and probe the charges made by the acting mayor and report back to this body at the earliest time possible. . . .

"In pursuance of said resolution, and on said 26th day of September, 1910, a committee of five persons, namely, E. L. Blaine, J. Y. C. Kellogg, T. P. Revelle, V. P. Hart and James Conway, were duly appointed as a committee under said resolution; and, immediately thereupon, they and each of them assumed their office as said committee. On the 21st day of October, 1910, said committee were in session at said city of Seattle and were at said time investigating charges of corruption on the part of certain persons connected with the administration of civic affairs in said city, and, on the said 21st day of October, A. D. 1910, he, said

Ludovic Dallagiovanna, appeared in person before said committee in said city of Seattle, at one of its sessions then being had and held, and he, said Ludovic Dallagiovanna, then and there being, was then and there duly sworn as a witness before said committee by and before Peter A. Kimple, who was then a duly appointed, qualified and acting notary public in and for the state of Washington, residing at said city of Seattle, that the evidence which he would give before said committee should be the truth, the whole truth and nothing but the truth, he, said Peter A. Kimple, as such notary public, then and there having sufficient and competent power and authority to administer said oath to said Ludovic Dallagiovanna in that behalf, and said Ludovic Dallagiovanna, being so sworn as aforesaid, did then and there knowingly, wilfully and feloniously swear falsely that he, said Ludovic Dallagiovanna, did not then have any interest in the Sixth Avenue Hotel in the said city of Seattle, and that he did not have anything to do with said Sixth Avenue Hotel, and that he had never received any money out of said Sixth Avenue Hotel, and that he did not then know who was then running said Sixth Avenue Hotel."

The arguments of counsel for both sides are directed to the question of the authority of the notary public, before whom it is charged respondent took the oath, to administer an oath under the circumstances recited in the indictment. The arguments proceed upon the assumption that this is the controlling question touching the sufficiency of the facts alleged to constitute the crime of perjury in the second degree, which is defined by § 2353, Rem. & Bal. Code, as follows:

"Every person who, whether orally or in writing, and whether as a volunteer or in a proceeding or investigation authorized by law, shall knowingly swear falsely concerning any matter whatsoever, shall be guilty of perjury in the second degree."

It is manifest that the word "swear," as used in this section, means to state a fact or facts under the sanctity of an oath or affirmation administered by some duly qualified officer having authority to administer the oath in the par-

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ticular proceeding or investigation in which the statement of the affiant is to be made. Counsel for the state rest their claim of authority in behalf of the notary administering the oath mentioned in the indictment, upon the following language of § 8298, Rem. & Bal. Code:

“Every duly qualified notary public is authorized in any county in this state: . . .

“(3) To take depositions and affidavits, and administer all oaths required by law to be administered, . . .”

Now whatever may be said as to the binding force of an oath as a basis for a perjury charge of this nature, administered by some other officer having powers defined by other statutory provisions, we are here dealing with the powers of a notary public as defined by this law, from which it is plain that a notary public cannot administer any oath with any binding force in law, except such oath is “required by law.” Whether or not the oath here involved was so required depends upon the powers of the committee in the particular proceeding or investigation they were engaged in at the time the alleged false statements were made before it. That the indictment must affirmatively state facts showing that the proceeding or investigation before the committee was such as lay within its power to investigate by requiring the sworn testimony of witnesses, seems too elementary to call for argument or citation of authorities in support thereof. This indictment fails to inform us of the nature of the matter the committee was authorized by the resolution to investigate, with any degree of certainty. The resolution only purports to authorize the committee “to investigate and probe charges made by the acting mayor.” Whom those charges were against or what they consisted of, is scarcely hinted at by the language of the resolution quoted in the information. The facts alleged, we think, are not sufficient to affirmatively show that the committee was investigating a matter which was within either the council or its jurisdiction. This being so, it does not affirmatively appear, from the language of

the charge made, that the oath was one "required by law;" and hence the administration of such oath by the notary public had no such binding force as is necessary to support a charge of perjury. The law relating to false sworn statements as a basis of a perjury charge, when such statements are made in a proceeding before a court or tribunal having no jurisdiction over the subject of inquiry, is well stated in the note to *Morford v. Territory*, 10 Okl. 741, 63 Pac. 958, 54 L. R. A. 513, as follows:

"It is established by numerous cases and beyond question that perjury cannot be predicated of a false oath in a proceeding before a court which had no jurisdiction to inquire into the matter which was the subject of that proceeding."

The application of this principle is illustrated in *Gallegos v. State*, 50 Tex. Cr. 190, 95 S. W. 123, where there was involved the jurisdiction of a grand jury. The court said:

"So it would appear that the grand jury were investigating or inquiring about a matter which was not a violation of the law. The court had no jurisdiction to make an inquiry except such matter as is an offense against the laws of the state of Texas. See the matter of jurisdiction discussed in *McDonough v. State*, 84 S. W. 594, 11 Tex. Ct. Rep. 972. The grand jury having under investigation a matter which was not an offense, perjury could not be predicated on false testimony delivered during such investigation."

We agree with the learned trial court, and affirm his ruling in sustaining respondent's demurrer to the indictment.

CROW, CHADWICK, and GOSE, JJ., concur.

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[No. 10261. Department One. June 18, 1912.]

**R. E. ANDERSON, Respondent, v. FRYE & BRUHN, Appellant.**<sup>1</sup>

**FRAUDS, STATUTE OF—LEASE—AGREEMENT FOR RENEWAL—VALIDITY.** Under Rem. & Bal. Code, § 8745, requiring all conveyances of real estate to be by deed, and § 8746, requiring deeds to be acknowledged, and § 8802, providing that leases for any term not exceeding one year shall be valid without acknowledgment, an unacknowledged lease for one year with the privilege of renewal is void and unenforcible.

**LANDLORD AND TENANT—LEASE—AGREEMENT FOR RENEWAL.** A lease for one year with the privilege of two year's renewal at a rental satisfactory to both lessor and lessee, is a single contract, calling for renewal at a reasonable rental, and not subject to the objection that the agreement for renewal was without consideration or unenforcible.

**LANDLORD AND TENANT—LEASE—TERMINATION.** An unacknowledged lease for a term exceeding one year being void, except as a lease from month to month, may be terminated by proper notice before the expiration of the year.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 25, 1911, upon findings in favor of the plaintiff, in an action for rent, after a trial to the court. Reversed.

*Higgins, Hall & Halverstadt (Hyman Zettler, of counsel),* for appellant.

*T. W. Hammond,* for respondent.

**PARKER, J.**—This is an action prosecuted by the plaintiff as lessor against the defendant as lessee to recover rent claimed to be due upon a lease contract, made in writing, but not acknowledged. The language of the contract, so far as material to our present inquiry, is as follows:

“Market Lease.

“This Indenture, Made this 3rd day of February, 1910, by and between R. E. Anderson, lessor, and Frye & Bruhn, incorporated, lessee, Witnesseth:

<sup>1</sup>Reported in 124 Pac. 499.

"That in consideration of the payment of the rents and the performance of all the covenants herein contained by the lessee and in the manner herein stated, lessor does hereby lease, let and rent unto the lessee, the following described property situate in the city of Tacoma, county of Pierce and state of Washington, to wit:

"Stalls Nos. 30, 31, 32 and 33, on first floor of building known as Tacoma Public Market, located on the southwest corner of 11th and D streets, on lots 1 and 2, block 1108, Tacoma, Washington, and includes water and lighting except special light in any of the stalls.

"This lease is made for a term of one (1) year from date market opens (with the privilege of two years' renewal at a rental satisfactory to both lessor and lessee), at the monthly rent of one hundred ten dollars, gold coin of the United States of America, said rent to be due and payable as follows: In advance, and thereafter on the first day of each and every month; and the said lessee does hereby promise to pay the said monthly rent herein named and in the manner specified, and not to assign or sell this lease nor let nor underlet the whole or any part of said premises nor make nor suffer to be made any alteration therein without the written consent of lessor."

On June 4, 1910, the defendant entered into possession of the premises. On August 27, 1910, the defendant, deeming the lease void because unacknowledged, and that, therefore, the tenancy was one from month to month only, gave to the plaintiff the thirty days' notice provided by Rem. & Bal. Code, § 8803, of its intention to vacate the premises and terminate the tenancy on October 1, 1910. The defendant vacated the premises accordingly on October 1, 1910. In June, 1911, upon the expiration of one year after the defendant went into possession of the premises, the plaintiff commenced this action, seeking recovery of rent under this lease contract for the entire year, except for the first month thereof, which we assume had been paid at the beginning. This, it will be noticed, was a claim for the time after as well as before the vacation of the premises by defendant. Judgment was rendered against the defendant for the full



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amount claimed, and it has appealed from so much of the judgment as awarded the plaintiff recovery of rent for the time subsequent to October 1, 1910, the date of the vacation of the premises.

The questions here presented relate only to the validity of this contract as a lease or as an agreement for a lease. Counsel for appellant contends that the contract is void, viewed in either of these aspects, because it is not acknowledged as required by law, and that therefore the tenancy under which appellant was in possession of the premises was nothing more than a month to month tenancy, the rent being payable monthly, which it had a right to terminate by its notice and vacation. Counsel for respondent contends that the contract does not purport to create a tenancy for a period exceeding one year, and that therefore it is not void for want of acknowledgment. Both apparently concede that, if the contract is void for want of acknowledgment, the tenancy was only from month to month, and was effectually terminated on October 1, 1910, by appellant's notice and vacation. Rem. & Bal. Code, § 8803; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232.

The necessity for an acknowledgment of the contract here involved, as well as that it be in writing, in order to render it valid and binding upon the parties, is found in the following sections of Rem. & Bal. Code:

"Sec. 8745. All conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance upon real estate shall be by deed."

"Sec. 8746. A deed shall be in writing, signed by the party bound thereby, and acknowledged by the party making it, before some person authorized by the laws of this state to take the acknowledgment of deeds."

"Sec. 8802. Tenancies from year to year are hereby abolished, except when the same are created by express written contract. Leases may be in writing or print, or partly in

writing and partly in print, and shall be legal and valid for any term or period not exceeding one year, without acknowledgment, witnesses, or seals."

In compliance with these provisions, this court has declined to recognize the validity of leases and agreements for leases of real property for a period exceeding one year when they are not in writing, and when they are not acknowledged. *Richards v. Redelsheimer*, 36 Wash. 325, 78 Pac. 934; *Watkins v. Balch*, 41 Wash. 310, 83 Pac. 321, 3 L. R. A. (N. S.) 852; *Dorman v. Plowman*, 41 Wash. 477, 83 Pac. 322; *Forrester v. Reliable Transfer Co.*, 59 Wash. 86, 109 Pac. 312. In the last cited case, the importance of the acknowledgment, in view of the provisions of the statutes making it an act to be performed as a part of the execution of the instrument and affecting its validity rather than as a mere prerequisite to its recording, was pointed out. It is apparent under these statutory provisions, that the acknowledgment of the instrument is as necessary to its validity as that it be in writing. 1 Cyc. 514. In *Richards v. Redelsheimer*, touching the question of the necessity of an agreement for a lease, as well as a formal lease, being in writing, the court said:

"When we come to consider the history of the statute, and the abuses which it sought to correct, principal among them being the tendency to fraud and perjury, it is difficult to distinguish any substantial difference between an oral contract to execute a written lease of real estate and an oral lease of real estate. For instance, an oral lease, which was clearly within the statute, could be construed to be a contract for a lease, and thus take the case out of the statute, and accomplish indirectly what could not be done directly. Brown, Statute of Frauds, 139, and cases therein cited."

See, also, 20 Cyc. 229.

This language would be equally applicable to the necessity of an acknowledgment to the instrument, under our statutes above quoted, since, as we have seen, acknowledgment is as necessary as writing. If absence of writing renders

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the contract void, the absence of acknowledgment, also renders it void.

Learned counsel for respondent argues that this contract does not purport to create in appellant a present interest in the premises beyond the one-year term; that is, that it is a lease for one year only, with the added agreement for renewal, which means the making of another lease at the end of the year, and hence, does not require acknowledgment in so far as its validity as a lease for one year is concerned. He has industriously collected, and ingeniously applied in his argument, many authorities dealing with the technical legal nature of the present interest created in a lessee, by a lease for a fixed term containing a covenant for renewal or extension beyond the term. We will find, however, as we proceed that this question is not controlling here, in view of our holding that it is as necessary to have an agreement for a lease acknowledged, as it is to have a formal lease acknowledged. It would seem that this argument of counsel could only be successfully maintained on the theory that there is evidenced by this writing two separate contracts, one being a lease for one year, the other being an agreement for the giving of a new lease at the end of the year; and that the validity of each can be determined without reference to the other. This theory, if sound, of course would enable us to hold the lease for one year valid, regardless of the validity of the agreement for renewal. But this, it seems to us, is wholly untenable. While this is a contract in which the parties have agreed to different things; the writing manifestly evidences a single transaction and a single contract, each of its parts being related to all its other parts. We cannot say that appellant would have agreed to take the premises for one year and assume the obligation to pay rent therefor during that term without the agreement on the part of respondent for renewal which we find in this writing. Indeed, we must presume that each of the covenants agreed to be performed by one party formed a part of the inducement for the other

party entering into the contract. This being a single contract, the agreement for renewal is inseparable from the lease for one year; and it being necessary to have the renewal agreement acknowledged, even if standing alone, we need not concern ourselves with the technical legal nature of the lessee's present interest under the renewal agreement. The fact remains that the renewal agreement must be acknowledged whether regarded as a technical lease or as an agreement to execute a lease. .

Some contention is made by counsel for respondent that the language of the renewal clause of this contract, to wit, "with the privilege of two years' renewal at a rental satisfactory to both lessor and lessee," is not such a complete agreement for renewal as is enforceable in law; the argument being that respondent would not be required to renew, because he would have the absolute right to decide that any rent would be unsatisfactory to him. Of course, if he would have such right, that part of the agreement would not obligate him to do anything, and for that reason probably could be ignored and thus leave nothing in the contract except the one year's lease. It is manifest that this language was put into the contract with a view to giving appellant some rights looking to a renewal which it would not otherwise have. This of course is inconsistent with the notion that respondent can, by any arbitrary action on his part, nullify this portion of the contract. The right of a party to exercise a right to arbitrarily decide a question arising under the terms of the contract, has often been the subject of consideration by the courts. In the case of *Parlin & Orendorff Co. v. Greenville*, 127 Fed. 55, 59, the United States Circuit Court of Appeals for the Fifth Circuit observed:

"The courts have had frequent occasion to construe contracts for the rendition of services, the manufacture of articles, and the construction or improvement of works, wherein it was agreed as a condition precedent to payment that the services, articles, construction, or improvement should be satisfactory to the promisor. Such contracts are of two

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kinds: First, where the right of decision is completely reserved to the promisor without his being required to disclose the reasons for his determination, and all right to inquire into the grounds of his decision or to examine and overhaul his determination by the promisee or the courts is absolutely excluded. The law regards the parties as competent to contract in that manner, and, if the contract is to that effect, it is the law of the case. Second, where the promisor is held to have undertaken to act reasonably and fairly and to found his determination on grounds which are reasonable, just, and sensible. Where the construction of the contract puts it in the second class, it follows as a necessary implication that the promisor's decision, in point of correctness and the adequacy of his grounds, is open to judicial determination.

"Whether a particular contract falls within the first class, where the promisor's decision is final, or in the second class, where it is subject to judicial investigation, depends on the special circumstances of each case. In contracts which involve the taste, feelings, or sensibility of the promisor, he may reject an article or work arbitrarily which has been mutually agreed should be made or done to his satisfaction. *Pennington v. Howland*, 21 R. I. 65, 41 Atl. 891, 79 Am. St. Rep. 774 (pastel portrait); *Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351 (portrait); *Zaleski v. Clark*, 44 Conn. 218, 26 Am. Rep. 446 (bust); *Brown v. Foster*, 113 Mass. 186, 18 Am. Rep. 463 (suit of clothes).

"There are also contracts subject to the same construction where questions of taste are not involved. It sometimes appears from the terms of the contract and the circumstances surrounding the parties that the promisor retained the unqualified right to reject the article or work if not satisfied with it; that his freedom of choice was not to be exposed to any contingency or subject to any review. Such contract may be injudicious and indiscreet on the part of the contractor who agrees to do work and furnish material on such a hazardous contingency, but, when such is clearly the agreement, the courts cannot afford relief against the consequences resulting from a bargain fairly made by competent parties. *Wood Machine Co. v. Smith*, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57 (reaping machine); *Singerly v. Thayer*, 108 Pa. 291, 2 Atl. 230, 56 Am. Rep. 207 (elevator); *McCarren v. McNulty*, 7 Gray 139 (bookcase).

"When the terms or the nature of the contract, or the

circumstances, are such as to make it doubtful whether the contractor has really agreed that the promisor shall have the absolute and unreviewable right to reject the article or the work if not satisfied with it, the courts have usually construed such contracts as 'agreements to do the thing in such a way as reasonably ought to satisfy the defendant.' In *Hawkins v. Graham*, 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422, where a heating apparatus 'satisfactory' to the promisor was to be furnished, it was held that the satisfactoriness was 'to be determined by the mind of a reasonable man, and by the external measures set forth in the contract, not by the private taste or liking of the defendant.' In reaching this conclusion the court was influenced somewhat by the fact that the consideration furnished 'was of such a nature that the value will be lost to the plaintiff, either wholly or in great part,' by a different construction of the contract."

Now if, under this contract, the decision of respondent upon the question of rental in the event of appellant's electing to renew was to be made at the commencement of the original term of the lease, or before appellant would partly perform the contract on its part, it would lose nothing however arbitrary the decision of respondent might be. But when we remember that such decision was to be made by respondent after the full performance by appellant of its covenant to pay rent for the full term of the original lease, this contract falls squarely within the principle suggested by the latter part of the above quoted language from *Parlin & Orendorff Co. v. Greenville*, *supra*; since this contract does not involve a question of taste, feelings, or sensibility on the part of respondent, nor is there in this contract any specific agreement that the decision of respondent as to the amount of rent he may demand for the renewal shall rest finally with himself. It is difficult to see that there would be anything involved in his decision touching the amount of rental upon renewal, except a question of reasonable rent for the renewal. This principle has been applied to the relation of landlord and tenant in *Arnot v. Alexander*, 44 Mo. 25, 100 Am. Dec.

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252; and *Mullaly v. Greenwood*, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. 613, though the provisions in the leases there involved do not seem to be exactly like the one here involved. This principle has also been recognized by this court in *Dean v. Williams*, 56 Wash. 614, 106 Pac. 130, where there was to be furnished "a perfect title satisfactory to the purchaser," in a real estate deal; and in *Seattle Automobile Co. v. Stimson*, 66 Wash. 548, 120 Pac. 73, where there was involved the contingent happening of an event which did not happen. *Richison v. Mead*, 11 S. D. 639, 80 N. W. 131; *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248; *Moot v. Business Men's Inv. Ass'n*, 157 N. Y. 201, 52 N. E. 1, 45 L. R. A. 666; *Fechteler v. Whittemore*, 205 Mass. 6, 91 N. E. 155. We think that this agreement for renewal would not be rendered unenforcible merely because the amount of rental for the renewal was left to the satisfaction of both parties; but that respondent, upon demand of appellant at the expiration of the year, would be required to renew at a reasonable rental.

We conclude that the contract here involved must stand or fall as a whole; that, if properly executed by acknowledgment as the statute requires, it would be enforcible; that, not having been acknowledged as the law requires, it is void and unenforcible; that the tenancy under which appellant was in possession of the property prior to October 1, 1910, was terminated on that day by notice and vacation, and that appellant is not liable for the payment of rent thereafter. It follows that the judgment must be reversed in so far as it awards rent in favor of respondent and against appellant for any time after October 1, 1910. It is so ordered.

DUNBAR, C. J., CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10262. Department One. June 18, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM A.  
RAYMOND, *Appellant*.<sup>1</sup>

**RAPE—EVIDENCE—CORROBORATION—NECESSITY.** Under Rem. & Bal. Code, § 2443, providing that no conviction of rape shall be had upon the testimony of the female against whom the crime was committed unless supported by other evidence, corroboration of her testimony as to the use of force to overcome her resistance is essential where force is an element of the offense under Id., § 2435.

**RAPE—EVIDENCE—SUFFICIENCY.** There is no corroboration of the prosecuting witness as to the use of force to overcome her resistance, where there were no eyewitnesses, no one heard her outcry, if she made any, she made no complaint for some time, her clothing was not torn and she was not injured, it not being sufficient to merely prove opportunity and recent penetration.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 16, 1911, upon a trial and conviction of rape. Reversed.

*Sidney J. Williams* and *William R. Bell*, for appellant.

*John F. Murphy*, *Crawford E. White*, and *Reah M. Whitehead*, for respondent.

PARKER, J.—The defendant, William Raymond, was charged by information in the superior court with the crime of rape upon the person of the prosecuting witness, committed without her consent and against her will, and by forcibly overcoming her resistance thereto. A trial before the court and a jury resulted in a verdict of guilty against the defendant. His motion for a new trial, based upon alleged erroneous rulings of the court occurring upon the trial and also upon the alleged insufficiency of the evidence to sustain his conviction, was denied. Thereupon the court sentenced him to an indeterminate term in the penitentiary

<sup>1</sup>Reported in 124 Pac. 495.



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of from ten years to life imprisonment. From this judgment, the defendant has appealed.

The principal contention made by counsel for appellant is that the evidence produced upon the trial was not sufficient to support the conviction, because of the absence of supporting evidence, other than that of the prosecuting witness. We will therefore review the facts disclosed by the testimony of the witnesses, having in view the determination of this question. On July 6, 1911, and for some time prior thereto, appellant was a chauffeur, operating an automobile in Seattle. He and one Berry, another chauffeur, were friends and kept their automobiles stationed on a street in Seattle not far from a hotel where a sister of the prosecuting witness was employed as a telephone operator. Berry was slightly acquainted with this sister, having met her first about a week previous. Appellant had never met the sister, and neither he nor Berry had ever met the prosecuting witness. Sometime during the day of June 6, Berry made arrangements with the sister for her and the prosecuting witness to go with appellant and himself automobile riding at 11 o'clock that night, that being the time when the sister would be relieved from her work for the day at the hotel. She communicated this to the prosecuting witness, who met her accordingly at 11 o'clock. The two met appellant and Berry a few minutes later upon the street, pursuant to the arrangement made by the sister and Berry, when those who were unacquainted were introduced, and they all four immediately got into one of the automobiles and started on their ride.

They proceeded north, stopping at a place on Pike street where the men purchased some liquor, which was taken along. They proceeded to a "club house" or "road house," as it was characterized by the different witnesses, about fourteen miles north of the city, arriving there probably about midnight or a little later. There was another party there in which there were some women of questionable character. They

danced and drank there until between two and three o'clock in the morning. The prosecuting witness participated in this to some extent at least, though she denied that she did so to the extent stated by other witnesses. They then started back to the city, Berry driving and the sister riding with him in the front seat, while appellant and the prosecuting witness rode in the back seat. They proceeded a comparatively short distance and arrived at the foot of a hill, where it was claimed there would be difficulty in getting the automobile up with the full load. So with the ostensible purpose of lightening the load, appellant and the prosecuting witness got out, and the automobile proceeded leaving them alone. There was a turn in the road ahead, and a shorter path by which they could go across and meet the automobile without following the road. So they started on the path, and soon thereafter, according to the testimony of the prosecuting witness, she was forced to submit to intercourse with appellant while alone with him. She testified as to how she resisted and cried out and how he finally accomplished his purpose. There were no eyewitnesses to what occurred there, nor did any one hear her outcries, if she made any. We need not notice the facts in detail here, further than those which have, or might have, some bearing on the question of corroboration of appellant's guilt, by other supporting evidence than the testimony of the prosecuting witness. She says he first took her pants off, and that she put them on again after the act and before leaving the place; but she admits that they were not torn. The condition of her garments offered in evidence confirms this admission. They reached the automobile soon after, got in, and all proceeded to the city. She said nothing then indicating that she had been wronged, and none of the party then made any remarks indicating suspicion. Her sister testified that, when they came to the automobile, "her (meaning prosecuting witness) hair was all down." When they arrived near the home of the girls in the north part of the city, they turned round

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and went back on the same road a considerable distance, when they again stopped, and appellant and the sister got out of the automobile and were for a time out of the presence of Berry and the prosecuting witness. The sister testifies to improper advances made by appellant towards her on that occasion, and of statements then made by appellant to her which it is contended by counsel for the state were in effect admissions that he had committed rape upon the prosecuting witness. Her testimony is very much involved, very unsatisfactory, and to a considerable extent contradictory. It is true she testified that, "he told me he did rape my sister." We will not attempt the practically hopeless task of analyzing her testimony here. We deem it sufficient to say that the connection in which he used the word "rape," as testified by her, could mean nothing more, in any event, than that he had intercourse with the prosecuting witness that night. It was not an admission that he had accomplished that act by force against her will.

After this occurrence, appellant and the sister returned to the automobile, when they drove to the end of a car line in the north part of the city, where the girls took a car for their home, arriving there about six o'clock in the morning. Just what account they gave to their mother of their night out is not shown, but it is clear that the prosecuting witness made no complaint or statement at that time indicating that she had been wronged in the manner charged. The prosecuting witness says she then went to bed. Sometime during that day she went to the office of the prosecuting attorney, and apparently told Mr. White, one of the deputies, something of the occurrences of the night before. This she says is the first time she even told any one anything about it. Whether or not she went to Mr. White for the purpose of telling her story, of her own volition, is not clear, though the record indicates in some degree that it was at the instance of some one else. Sometime during that day, she was taken to a physician for examination to determine whether

or not she had recent sexual intercourse. The physician testified that he found that, "The condition of the opening was such as to show that a recent entrance was made into the passage known as the vagina, as evidenced by a recent abrasion in what is medically known as the hymen." He expressed the opinion that it had occurred within twelve hours. The prosecuting witness was at the time a fully matured woman sexually, though she was only about 17 years old. Her sister was about 19 years old. We believe the foregoing are all of the facts shown by the evidence necessary for us to notice, touching the question of the sufficiency of corroborating evidence, other than the testimony of the prosecuting witness, to support the conviction.

Section 2443, Rem. & Bal. Code, provides:

"No conviction shall be had for violation of any of the foregoing provisions of this chapter upon the testimony of the female upon or against whom the crime was committed, unless supported by other evidence."

This has reference to sexual crimes defined in the same chapter, among which is rape defined by § 2435 as follows:

"Rape is an act of sexual intercourse with a female not the wife of the perpetrator committed against her will and without her consent. Every person who shall perpetrate such an act of sexual intercourse with a female of the age of ten years or upward not his wife: . . . (2) When her resistance is forcibly overcome; . . . Shall be punished by imprisonment in the state penitentiary for not less than five years."

This is the law that appellant is charged with violating. While the prosecuting witness was only 17 years old at the time, we are to remember that appellant is not charged with carnally knowing a female of previous chaste character between the ages of 15 and 18 years, with her consent; which is a crime under § 2436, Rem. & Bal. Code. That is not as great a crime as we are here concerned with. Appellant could not be punished for that crime to the extent of this judgment.

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There are two principal facts necessary to be proven beyond a reasonable doubt in order to convict appellant of this crime; first, that he had sexual intercourse with the prosecuting witness; and second, that it was against her will and by forcibly overcoming her resistance thereto. Now assuming that her testimony given in this case is sufficient to prove these facts, provided the law required no other evidence, to what extent must appellant's conviction be supported by other evidence in order to satisfy the requirements of § 2443, Rem. & Bal. Code, above quoted? The authorities do not seem to be harmonious upon this question, though the lack of harmony may be more apparent than real in the light of the difference in the statutes prescribing the rule. The supreme court of Oklahoma in *Harvey v. Territory*, 11 Okl. 156, 159, 65 Pac. 837, made a very clear statement pertinent to this inquiry as follows:

"It is contended by plaintiff in error that this statute requires corroboration of the prosecutrix on every element of the offense. We cannot agree with this contention. The authorities seem to be in irreconcilable conflict on this question, but such conflict is more apparent than real. Almost every state has a statute requiring some kind of corroboration in this class of cases, yet these statutes very materially vary in their provisions and requirements. It is by reason of this difference in the various statutory provisions, that the seeming conflict in the decisions of the courts arises. We must first determine the meaning and purpose of our own statute. The only requirement is that the prosecutrix must be 'corroborated by other evidence tending to connect the defendant with commission of the offense.' Now, there are but two things that he is charged with doing, viz.: promising to marry the prosecutrix, and having illicit connection with her. The other two elements of the offense go to the character of the person protected by the law, viz.: an unmarried female, and one of chaste character. With these two elements the defendant is in no way connected; no action of his brings about either condition, but if he has promised to marry her, then he is connected with this element of the crime, and her evidence alone is not sufficient to establish such

promise, and if he has had illicit intercourse with her, this act also connects him with the offense, and the evidence of the female with whom the intercourse was had is not sufficient to prove such fact. Hence, we think the purpose of the statute is to require the prosecutrix to be corroborated on the promise of marriage and the illicit intercourse, and not upon the elements that go alone to her characteristics, viz.: that she was unmarried, and that she was of chaste character."

In this case, appellant would not be guilty unless he had, (1) intercourse with the prosecuting witness, and (2) accomplished it by force as charged. These are the elements, each of which, he must necessarily be connected with to render him guilty. Indeed they must each be his own physical act. In *State v. Timmens*, 4 Minn. 325, 332, involving a statute more nearly like ours than the Oklahoma statute, the court said:

"The statute creating the offense of adultery under promise to marry is in these words: 'Any unmarried man who under promise of marriage . . . shall seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor,' etc., 'but no conviction shall be had under the provisions of this section on the testimony of the female seduced unsupported by other evidence.'

"A conviction cannot be had under this statute upon the testimony of the woman seduced unless she is corroborated upon every material point necessary to the perfection of the offense, to wit: the promise to marry, the seduction under such promise, and the previous chaste character of the party seduced."

This holding is farther reaching than the Oklahoma decision. Possibly there is room for saying that the broader statute justifies it. Our statute is fully as broad. In *Armstrong v. People*, 70 N. Y. 38, 43, involving a statute in substance the same as ours, the court said:

"The statute under which the plaintiff in error was indicted, declares that there shall not be a conviction upon the testimony of the female complaining, not supported by other

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evidence. It is settled that the supporting evidence is required as to two of the matters named in the act, and as to them only. They are the promise of marriage, and the carnal connection. (*Kenyon v. The People*, 26 N. Y. 203; *Boyse v. The People*, 55 N. Y. 644.)”

Again, in *People v. Plath*, 100 N. Y. 590, 592, 3 N. E. 790, 53 Am. Rep. 236, the same eminent court in a unanimous opinion said:

“The defendant was indicted and upon trial convicted of the crime of abduction, in that he ‘with force and arms feloniously did take one Katie Kavanaugh for the purpose of prostitution, she the said Katie Kavanaugh being then and there a female under the age of sixteen years.’ It was essential to the support of this conviction that the people show, not only a taking by the defendant within the meaning of the statute, but also that such taking was for the purpose of prostitution. (Penal Code, § 282; as amended by § 2, chap. 46, Laws of 1884.) If the evidence establishes only a taking and fails to show that it was *for the prohibited purpose* it is insufficient to sustain the conviction, and so proof of the fact that the person of the female was used for purposes of prostitution without proof of the abduction would not bring the accused within the condemnation of the statute. It is elementary, when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with the specific intent. (Lawson on Presumptive Evidence, 472.) Neither can a conviction under this act be sustained upon the unsupported evidence of the female abducted. (Penal Code, § 283.) In cases where corroboration is required there has been some diversity of opinion in the authorities, as to the particular facts which should be corroborated, and the extent of the corroboration needed in order to comply with the rule; but it is now conceded to be the general rule, that it should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it. . . .

“The policy of the statute under consideration would seem to forbid the conviction of a person of the crime of abduction, upon the unsupported evidence of the subject of the crime, and a conviction founded upon the evidence of the

abducted female alone as to one of the elements constituting the crime, would be contrary to its implied prohibition. Such evidence must, therefore, tend to prove each of the facts constituting the crime, for otherwise a person might be convicted of an offense as to one of whose elements there existed no proof except that of the alleged abducted female. If the corroborative evidence goes to the support of the alleged purpose alone it is apparent that there is no legal proof of the commission of a crime, and it would be the same if the corroboration was confined to a support of the taking alone, and the proof as to the purpose was uncorroborated. It is not indispensable that such corroboration should be furnished by positive and direct evidence, but proof of circumstances legitimately tending to show the existence of the material facts will be sufficient to authorize a conviction. In one form or the other, however, proof must be given, aside from that of the female, tending to establish the commission of a crime, and that it was perpetrated by the person accused before a conviction can be lawfully had."

In harmony with these authorities, this court in the recent case of *State v. Gibson*, 64 Wash. 131, 133, 116 Pac. 872, said:

"The other evidence in support of the testimony of the female must support her testimony upon the main facts; namely, that the crime was committed and that the accused was the person who committed it."

Some remarks of this court in previous decisions, when viewed superficially, may seem somewhat out of harmony with this language, but when critically read in the light of the particular circumstances involved, we think it cannot be said that this court has ever held that the supporting evidence required by the statute need not tend to show the connection of the accused with all of the elements of the crime which it is necessary for him to be connected with in order to render him guilty. We are of the opinion that, since appellant must necessarily be connected with the act of intercourse, and also with the act of accomplishing it by forcibly overcoming her resistance thereto, the corroborating evidence



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must tend to prove both of these facts. Whether or not it is necessary to have corroborating evidence of elements of sexual crimes with which an accused could have no connection, such as the age or chastity of the female, which are elements of some of such crimes, we do not now decide. We have deemed it necessary to review the general question as to what facts require corroborating evidence and arrive at some definite conclusion relative thereto, because it is useless to inquire as to the corroborating effect of any particular evidence until we determine what facts must be corroborated.

The real question here is, does the corroborating evidence relied upon materially tend to prove the two main facts which we have seen are necessary to be proven to establish appellant's guilt? Let us assume, for argument's sake, that there was sufficient evidence other than the testimony of the prosecuting witness to support the conclusion that she had sexual intercourse with appellant during the night in question. There is still left to be proven the fact that he accomplished that act against her will and by forcibly overcoming her resistance thereto. Was there other evidence than her testimony fairly tending to establish such fact? The evidence showing that appellant and the prosecuting witness were away from the automobile, and alone for a time, only shows an opportunity for intercourse. Such fact does not tend in any degree to show the use of force. The evidence showing that, upon their return to the automobile her hair was hanging down, is no more persuasive on that subject. The finding of a recent abrasion of the hymen by the physician may be some evidence of recent intercourse. That fact, however, is no evidence of such intercourse being other than voluntary on her part. She does not claim to have been otherwise injured nor is it shown that she complained of pain from this injury, nor even that any of her clothes were torn; yet she says appellant removed one of her undergarments without tearing it. The testimony of the sister as to statements made by appellant to her, claimed by the state

to be an admission by him of the commission of the crime here charged against him, we have already noticed were in no event more than an admission of intercourse with the prosecuting witness. This did not prove that such intercourse was against her will. She made no complaint to either her sister or mother when she arrived home, nor did she tell any one anything of the affair until later when she went to the prosecuting attorney's office. We are not advised of the nature of that story. We do not even know but that it was drawn from her there by others against her inclination to tell. In any event, her act of going to the prosecuting attorney and telling something of the occurrence is not shown to be of such a nature as that it could be considered a part of the *res gestae*, and it is therefore not corroborating evidence worthy of consideration. These are apparently all of the facts the state relies upon to support the conviction, other than the testimony of the prosecuting witness, and a diligent search in this record does not suggest any others to us. We are of the opinion that they do not meet the requirements of § 2443, Rem. & Bal. Code, above quoted. This view finds support in the following decisions of this court: *State v. Stewart*, 52 Wash. 61, 100 Pac. 153; *State v. McCool*, 53 Wash. 486, 102 Pac. 422, 132 Am. St. 1089; *State v. Workman*, 66 Wash. 292, 119 Pac. 751; *State v. Roberts*, 66 Wash. 503, 119 Pac. 836; *State v. Aton*, 67 Wash. 485, 121 Pac. 980. Some of these cases deal with sexual crimes in which force and want of consent are not elements. In such cases, of course, no proof is needed of facts constituting such an element. But we think that they are all in harmony with the view that the facts here relied upon are not sufficiently corroborative of the use of force, and that proof of facts constituting one principal element of the crime is not corroborative proof of facts necessary to constitute another equally important element of the crime.

Learned counsel for the state argue, in substance, that they could not have produced more convincing corroborating

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evidence in this case without producing eyewitnesses which they could not do and which all must recognize seldom can be done in such cases, and hence the necessity of depending upon evidence of a less direct nature. It must be conceded that the state did not intend to hinder its prosecuting officers to the extent of requiring proof by testimony of eyewitnesses in prosecuting defendants charged with this and other classes of crimes which usually are committed where there are no such witnesses; but it is manifest that this statute requires that the corroborating evidence, "must have some real supporting force," and "must be something more than a colorable support," using the language of Justice Ellis in *State v. Gibson, supra*, at page 137. Competent circumstantial evidence is not ordinarily more apt to be wanting to prove rape by force than such evidence is usually wanting to prove the commission of many other crimes which are usually committed in secret. That such evidence is wanting in this particular case will not warrant us in ignoring the statute. It would never do to hold that, because an accused person cannot be convicted for want of competent evidence against him, he may for that reason be convicted upon incompetent evidence. We need not discuss the assignments of error relating to the trial court's instructions, since what we have already said will sufficiently show the errors in the instructions given so far as they are erroneous in the particulars complained of.

The judgment is reversed and appellant granted a new trial.

GOSE, CROW, and CHADWICK, JJ., concur.

[No. 10004. Department Two. June 19, 1912.]

DELNO P. KENYON *et al.*, *Respondents*, v. WALTER B.  
ERSKINE *et al.*, *Appellants*.<sup>1</sup>

**HOMESTEADS—EXEMPTIONS—EXECUTION—TIME FOR FILING DECLARATION.** The lien of a judgment is superseded and rendered unenforceable where, prior to execution, the judgment debtor files a declaration of homestead.

**SAME—CLAIM OF EXEMPTION—WAIVER.** Where a judgment creditor claims a lien superior to a homestead claim, and stands upon his contention without asking an appraisal, he cannot on appeal allege that the claim exceeded \$2,000 in value, and allege error in the court's failing to direct steps to subject the excess to sale.

Appeal from a judgment of the superior court for King county, Myers, J., entered September 15, 1911, in favor of the plaintiffs, in an action to restrain an execution sale. Affirmed.

*Howard O. Durk*, for appellants.

*Charles H. Miller*, for respondents.

FULLERTON, J.—On March 23, 1911, the appellant Walter B. Erskine duly obtained a judgment against the respondents, Delno P. Kenyon and Ella M. Kenyon, husband and wife, in a justice court of King county, for the sum of \$99.92. On May 12, 1911, he caused a transcript thereof to be filed in the office of the county clerk of King county, pursuant to the provisions of § 450 of Rem. & Bal. Code, providing the manner in which a judgment of a justice of the peace shall be made a lien upon the real property of a judgment debtor. The judgment debtors at that time owned lot 5, and the east half of lot 6, in block 7, of Baltimore's addition to the city of Seattle, on which they were residing. On May 19, 1911, Delno P. Kenyon, the husband, executed

<sup>1</sup>Reported in 124 Pac. 392.

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and acknowledged, and caused to be filed for record, a declaration of homestead, conformably to the statutes, in which he claimed the property above described as a homestead and exempt from execution and attachment to the extent of two thousand dollars in value. Thereafter, the appellant caused an execution to issue on the judgment to the sheriff of King county, who levied upon the homestead property and advertised the same for sale in the manner in which property is ordinarily sold on execution. This action was thereupon brought to enjoin the sale. A temporary injunction was issued, which was afterwards made permanent, and the respondents allowed to recover costs. This appeal followed.

The appellants contend that the filing of the declaration of homestead on the property sought to be sold subsequent to the time the transcript of the judgment of the justice of the peace was filed with the county clerk did not have the effect of superseding or postponing the lien of such judgment, but, on the contrary, the right acquired by filing the declaration was subsequent to and subject to the lien; and hence a sale of the property could be had under an execution in the same manner that it could have been so sold had the declaration of homestead not in fact been filed. Briefs were filed by counsel for the respective parties in which the question has been exhaustively argued, but in view of the case of *Snelling v. Butler*, 66 Wash. 165, 119 Pac. 3, decided since the briefs were written, we have not found it necessary to follow the argument in detail. In the case cited, the facts are exactly parallel to the facts in the case at bar, and we there held that the lien of the judgment was superseded and rendered nonenforcible on the lands claimed as a homestead by the filing of the homestead declaration. In the course of the opinion this language was used:

“The judgment became a lien upon the property subject to the right of the owners to defeat execution sale by the filing of a homestead declaration. They filed the declaration before the issuance of the execution. When the declara-

tion was filed, the property became a homestead and, as such, it was exempt from execution or forced sale."

The cases before this court prior to that decision in which the question discussed was more or less involved, are the following: *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Waldron v. Kineth*, 41 Wash. 459, 84 Pac. 16, 111 Am. St. 1022; *Donaldson v. Winningham*, 48 Wash. 374, 93 Pac. 534, 125 Am. St. 937; *North Pacific Loan & Trust Co. v. Bennett*, 49 Wash. 34, 94 Pac. 664; *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153; *Olson v. Goodsell*, 56 Wash. 251, 105 Pac. 463. It may be that these cases are not altogether in harmony one with the other, and it may be, also, that all of them cannot be reconciled with the decision cited as containing the latest expression of the court's views. But they are here cited not with the idea of reconciliation, but that it may be known that we affirm the case of *Snelling v. Butler* with full knowledge of our prior holdings on the questions therein involved.

The appellants further contend that it appeared at the hearing that the homestead claim had a value in excess of two thousand dollars, and that the court erred in failing to direct that the statutory steps be taken to subject it to sale for this excess of value. But, as we read the record, the appellants did not seek to have the property sold as homestead property is sold under execution. Their contention was that the homestead was inferior to and subject to their lien; and when the court decided this question against them, they stood upon their contention, allowed judgment to go against them, and at no time asked that the sale be made for the excess value of the homestead.

The judgment is affirmed.

MOUNT, ELLIS, and MORRIS, JJ., concur.

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[No. 10130. Department Two. June 19, 1912.]

N. G. KAUFMAN, *Appellant*, v. FRANK KLAIN *et al.*,  
*Respondents*.<sup>1</sup>

JUDGMENT — RES JUDICATA — MATTERS DETERMINED — EVIDENCE — SUFFICIENCY — PARTIES. In an action to foreclose mortgages a plea of former adjudication is established where plaintiff admitted that, in a former action brought against him by the defendant for wages, he (the plaintiff) had set up in defense an indebtedness to him for advances made which he sought to recover and which was represented in part by the mortgages, and the case was submitted to a jury with directions to bring in a verdict in favor of the party to whom any balance was due; and it is immaterial that the parties were not all the same in both actions, the other persons not being primarily interested and merely proper parties.

JUDGMENT — RES JUDICATA — APPEAL — EFFECT. An appeal from a judgment does not suspend its effect as *res judicata*.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered August 17, 1911, upon findings in favor of the defendants, in an action to foreclose mortgages, after a trial to the court on the merits. Affirmed.

*J. C. Cross*, for appellant.

*Boner & Boner*, for respondents.

FULLERTON, J.—The appellant instituted this action to foreclose four certain mortgages, two of which were executed by the respondents Klain and wife to the appellant direct, and two of which were executed by the respondents Klain and wife to the respondent Buttner and by Buttner assigned to the appellant. The complaint was in the usual form in such cases; it set forth the mortgages and prayed for their foreclosure. To the complaint, the defendants Klain and wife answered, setting up against all of the mortgages a plea of payment; and to the mortgages assigned to the plaintiff by Buttner, in addition thereto, the plea of former adjudica-

<sup>1</sup>Reported in 124 Pac. 391.

tion. The trial court at the hearing found that the plea of payment had not been sustained, but upheld the plea of former adjudication, allowing a foreclosure only of the two mortgages first mentioned. This appeal is from that portion of the decree upholding the plea of former adjudication.

It is the appellant's main contention that the evidence does not justify the conclusion that the indebtedness now claimed to be owing upon the mortgages was the subject of litigation in any former action, but we think this point is definitely settled by the testimony of Kaufman himself. The defendant introduced the record of another cause, in which it appeared that Klain had sued Kaufman and Buttner for wages due him for personal services, and for certain farm products which he had advanced to the use of the defendants; that to this complaint Kaufman had pleaded an indebtedness due him for advances made to Klain exceeding the sum of ten thousand dollars; that a trial was had in which each party had introduced evidence in support of their respective claims, and in which the court had charged the jury, in substance, that, if they found that either party had established his claim or any part thereof by a preponderance of the evidence, they should allow him the amount so proven, and if they found that both parties had established their claim or some part thereof, they should return a verdict for the difference, if any, in favor of the party in whose favor the balance is, and that the jury returned a verdict in favor of Klain. On the trial of the present case, appellant Kaufman testified that the indebtedness he had sought to recover in the former action was in part the indebtedness claimed in this action, and was represented by the two mortgages given by Klain to Buttner and by Buttner assigned to him. This, to our minds, leaves no question as to the subject-matter in litigation in the two several actions, and shows conclusively that, as between the defendant Klain and the plaintiff Kaufman, there has been a former adjudication of the rights of the parties in the indebtedness represented by the mortgages. There is no merit



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in the objections that the parties to the present actions are not the same as they were in the former, or that the record offered does not show a final judgment. The real parties in interest in both actions were Kaufman and Klain. The dealings which gave rise to the actions were between them and their privies, and they were the only parties affected by the result of the actions. The other parties, while proper parties to the proceedings, were not necessary parties; they had no substantial rights in the subject-matter of the action.

The claim that there was no final judgment in the former action is founded on the fact that an appeal had been taken to this court from the judgment therein, which was pending at the time of trial in the court below of the present action. Whether the taking of an appeal from a judgment suspends its effects as *res judicata* is a question upon which the courts are divided; but we think the better reason, if not the weight of authority, is with the holding that it is not so suspended. See, 23 Cyc. 1128, 1223.

There was no error in the finding of the court and the decree will stand affirmed.

MOUNT, ELLIS, and MORRIS, JJ., concur.

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[No. 9944. Department Two. June 20, 1912.]

ORIENTAL REALTY COMPANY, *Respondent*, v. H. C. TAYLOR  
*et al.*, *Appellants*.<sup>1</sup>

PARTNERSHIP—CONTRACT—CONSTRUCTION—JOINT ADVENTURES. A partnership is created by an agreement between two persons to enter into the business of dealing in tax titles, whereby one was to conduct the business and the other was to furnish what money he deemed advisable, to hold the title, and to receive back his advances and interest, before even division of the balance as profits; especially where the parties in a subsequent written agreement refer to the relation as a copartnership.

<sup>1</sup>Reported in 124 Pac. 489.

TRUSTS—PRINCIPAL AND AGENT—AGENCY WITH INTEREST. There is an agency with an interest, where a principal takes tax titles, obtained by his agent, under an agreement to divide the profits equally, after return of the money advanced with interest; and the principal holds the title in trust and is liable to an accounting.

ASSIGNMENTS—PROPERTY ASSIGNABLE—AGENCY WITH INTEREST. Where property is held in trust for an agent, and subject to an accounting for profits, the agent's interest is assignable.

Appeal from a judgment of the superior court for King county, Main, J., entered April 29, 1911, upon findings in favor of the plaintiff, in an action for an accounting, after a trial to the court. Affirmed.

*Ira Bronson*, for appellants.

*Kerr & McCord*, for respondent.

MOUNT, J.—This action was brought by the plaintiff to secure an accounting and a division of real estate held in the name of the defendants Taylor and wife. On a trial of the case, the court granted the relief prayed for. The defendants Taylor and wife have appealed.

It appears that, in December, 1894, the defendants H. C. Taylor and D. F. McConnaughey entered into a written agreement, as follows:

"Whereas, H. C. Taylor and D. F. McConnaughey are about to enter into the business of buying at tax sales and dealing in tax titles;

"It is therefore mutually agreed between said parties that the said H. C. Taylor shall furnish the said D. F. McConnaughey with whatever money he shall deem advisable to invest in such ventures. That the said D. F. McConnaughey shall attend to all of the details and perform all of the work necessary to properly conducting and managing said business, including attendance at tax sales, taking proper certificates and deeds, giving proper notice to owners, and all other matters necessary to properly conducting said business. That the title to all property purchased at any such sale and all certificates of purchase shall be taken in the name of H. C. Taylor. That said H. C. Taylor shall be paid out of the profits of said business an amount equal to ten per

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cent interest per annum on the money invested. That whatever profits shall remain after paying the ten per cent aforesaid shall be equally divided between said H. C. Taylor and said McConnaughey and said McConnaughey shall receive no other pay for his services."

In pursuance of this agreement, Taylor advanced certain sums of money, which were invested from time to time in delinquent tax certificates. The certificates were taken in the name of H. C. Taylor, and the property in controversy in this action was acquired by foreclosure of such certificates, except one piece, known as the St. Charles Hotel property, which was acquired by defendants under an agreement as follows:

"This agreement made this 10th day of September, A. D. 1898, between H. C. Taylor and L. R. Taylor, his wife, of Seattle, King county, Washington, parties of the first part, and D. F. McConnaughey, party of the second part, Witnesseth,

"That, whereas, the parties hereto are about to purchase the east 70 feet of lot 1 in block 2, D. S. Maynard's plat of the town (now city) of Seattle, known as the St. Charles Hotel property, for the stipulated price of \$26,500, subject to a mortgage thereon now outstanding, amounting to \$15,000 of principal and bearing interest at the rate of 6½% per annum; and whereas the title to said property is to be taken in the name of H. C. Taylor and the said H. C. Taylor has advanced for the purchase of said property certain moneys and securities of the agreed amount and value of \$10,194;

"Now, therefore, it is hereby agreed by the parties of the first part that the said H. C. Taylor holds said property in trust for the copartnership consisting of himself and the party of the second part upon the understanding and agreement that out of the income or out of any moneys arising from the sale of said property, after paying all necessary expenses, taxes, insurance, assessments, repairs or other expenditures for the benefit of said property, the said H. C. Taylor is to be paid the said sum of \$10,194 with interest thereon at 8% per annum from the date of purchase of said property until the same shall be fully paid, said sum of

\$10,194 not to become due and payable until the same shall be payable out of the moneys arising from the said property; but it is understood that if the same can be paid by a loan upon said property or other properties of the said copartnership at a lower rate of interest or can be paid out of other moneys to the said copartnership in any wise belonging, then the said party of the second part shall have the right to pay such sum from such moneys. It is further agreed that, when said sum of \$10,194 and the interest thereon herein provided for have been fully paid, then the said party of the first part shall and will make, execute and deliver a deed to an undivided one-half interest in and to the said property to the party of the second part on his demand. It being expressly understood that the said property is bought for the said copartnership, and that all profits arising from the purchase of such property and the sale thereof, and the lease thereof, or in any other wise arising, are to be equally divided between the said parties of the first part and the party of the second part, subject, however, to the payment to the parties of the first part of said sum of \$10,194 and the interest thereon as herein provided."

This agreement was signed by Taylor and his wife, and was duly acknowledged. The actual business of buying certificates and of handling the property acquired as above stated, and collecting the rents and paying taxes, was conducted for several years principally by J. W. McConnaughey, a brother of D. F. McConnaughey, J. W. McConnaughey having by mutual consent some interest in the business, which interest did not affect the interest of Taylor. About November 1, 1904, when Mr. Taylor had a large sum of money invested in the property, he became dissatisfied with the management thereof by Mr. McConnaughey and took the management thereof to himself, and afterwards collected the rents and revenues from the business. During that same month, the McConnaugheys assigned and transferred all their interest in the property and business to M. F. Backus; and in January, 1905, Mr. Backus and wife sold and transferred all their interest to the plaintiff in this case, the Oriental Realty Company. In 1909 the Oriental Realty

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Company brought this action for an accounting and a division of the property. Upon the trial the court concluded:

"That, under and by virtue of the contract of December 27th, 1894, a joint adventure or business arrangement, embracing many of the elements of a copartnership, was formed between H. C. Taylor and D. F. McConnaughey, and that the contract of September 10, 1898, was a continuation of said relationship, and that all of the property described in the complaint and hereinbefore described was acquired under and by virtue of such relationship, and that the title to said property rests in H. C. Taylor, and that he holds the same in trust for himself and for the plaintiff Oriental Realty Company as the successor in interest of said D. F. McConnaughey. . . . That upon the payment of said sum of \$22,385.83 to the said H. C. Taylor, or to his attorney, or upon the payment of the same into the registry of this court, the plaintiff is entitled to a conveyance from the said H. C. Taylor and L. R. Taylor, his wife, of an undivided one-half interest in all of the real estate above described, free and clear of encumbrances except the mortgage of \$15,000 above mentioned."

The appellants assign that the court erred in holding that the agreement between Taylor and McConnaughey created a joint adventure, that the present relation between the Oriental Realty Company and Taylor and wife is that of joint adventurers, and that the rights of said parties are the same as though such relationship composed a partnership; and also that the Oriental Realty Company is the owner of an undivided half interest in the property in controversy. The main contentions on the part of the appellants are that no partnership relation existed between Mr. Taylor and Mr. McConnaughey, and that the court could not properly decree a half interest in the property to plaintiff. No question is made upon the accounting which the court took. We shall, therefore, assume that the accounting, if proper to be made, is correct, and shall notice the contentions as stated above.

The relations of the defendant H. C. Taylor and D. F. McConnaughey were defined by the written contract first

above quoted. It is plain therefrom that Mr. Taylor and Mr. McConnaughey agreed to enter into the business of buying property at tax sales, and dealing in tax titles. Taylor was to furnish the money and McConnaughey was to perform all of the work in conducting the business. Title to the property acquired was to be taken in the name of Taylor. Taylor was to receive an amount equal to ten per cent on the money invested. Whatever profits remained after paying the ten per cent were to be divided equally. McConnaughey was to receive no other pay for his services. In short, Taylor was to furnish the money, McConnaughey was to furnish his time and skill and manage the business, and after deducting the cost, plus ten per cent per annum on the money invested, the balance or profits were to be divided equally. No limit of time was fixed. It would seem, upon the plainest principles of law, that this writing shows a partnership to be conducted under the name of H. C. Taylor by Mr. McConnaughey. *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225. See, also, note to *Miller v. Simpson*, 107 Va. 476, 59 S. E. 378, 18 L. R. A. (N. S.) 962.

It is true, no mention is made of the losses; but losses, if any, must first be deducted before there could be profits, and necessarily must be borne equally. The contract, executed in September, 1898, when the St. Charles Hotel property was purchased, refers to the relation between Taylor and McConnaughey as a copartnership. This agreement is signed by the appellants, and tends to show how the parties at that time construed their relations in regard to the business.

But we deem the exact legal status of these parties at that time as of no special importance; because, if McConnaughey at that time was a mere agent authorized to purchase these certificates and acquire lands to be held in the name of Taylor, he was an agent with an interest in the property purchased. When the property was purchased in the name of Taylor, the latter took it in trust to be held for himself and Mr. McConnaughey. There was no limit to the time he

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should hold it. When the property was sold, the purchase price, with ten per cent per annum, was to be deducted, and the balance or profits were to be divided equally between them. In the item of the hotel property, which was a special purchase, the interest was only eight per cent per annum.

In the case of *Seymour v. Freer*, 75 U. S. 202, which was a case involving a contract somewhat similar to the one now under consideration, but which was not so clear in fixing a partnership relation between the parties, and which fixed a limit of time when the property should be sold, the court held that the relation between the parties was one of agency, and said, at page 213:

"We think Seymour took the legal title in trust for the purposes specified. A trust is where there are rights, titles, and interests in the property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion, but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked. Interests in real estate, purely contingent, may be made the subject of contract and equitable cognizance, as between the proper parties. The object of the trust here was to sell the property within the time limited, and, after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue. To this extent, Seymour was a trustee, and Price the *cestui que trust*. They had a joint interest in the property. Seymour held the legal title, but the rights of Price were as valid in equity as those of Seymour were at law."

And, again, the same opinion recites:

"There is another view of the subject, which we think may properly be taken. The agreement, that the property should be sold, and half of the profits paid to Price, was a charge upon the property, and gave him a lien to the extent of the amount to which he should be found entitled upon the execution of the agreement, according to its terms. The prin-

ciple involved in this proposition is a familiar one in equity, and constantly applied in the administration of its jurisprudence. It is insisted by the appellees that the contract made the parties copartners in respect to the lands to be bought. We cannot adopt that view of the subject. . . . But the result is the same as if we held that the parties were copartners. In that event, Seymour would still have held the property as trustee for the firm, according to the rights of the respective members."

So it was in this case. If there was no partnership, the property was acquired and taken in the name of Taylor, not for himself alone, but in trust for the benefit of himself and McConnaughey. When the business produced sufficient funds to pay the original amount invested, with a specified interest, the balance or profits belonged equally to Taylor and McConnaughey. It made no difference therefore which held the legal title. The result would be the same whether they were originally copartners or sustained some other legal relation. At the time Taylor took the sole management of this property in 1904, some ten years after the first contract was entered into, the relation of the parties ceased, but Taylor held the property subject to his claim for the money advanced, with interest. He was, of course, bound to account for the rents and profits of the property to McConnaughey, who was to share equally with him in whatever was left. McConnaughey's interest in the property was clearly an assignable interest. When he sold and transferred it to the plaintiff in this case, the plaintiff acquired whatever interest he had. We are satisfied, therefore, that the trial court properly concluded that appellant held the property in trust for himself and the plaintiff, and that the final decree was right. It is therefore affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.



[No. 10177. Department Two. June 20, 1912.]

PARKER-BELL LUMBER COMPANY, *Appellant*, v. GREAT  
NORTHERN RAILWAY COMPANY, *Respondent*.<sup>1</sup>

CARRIERS—OF GOODS—CONNECTING CARRIERS—NEGLIGENCE—LIABILITY OF INITIAL CARRIERS—RESHIPMENTS. Where a car load of shingles was shipped over connecting lines to its destination in Illinois, and from there, without notice to the initial carrier, re-shipped over other lines to a new point of destination in New Jersey, where it arrived in a damaged condition, the initial carrier's responsibility ended with the arrival of the shingles at the destination named in its bill of lading; and the fact that a connecting carrier at St. Paul removed the shingles from a box car to an open car without notice to the shipper, does not show negligence in forwarding the shingles to their destination in Illinois, nor render the initial carrier liable for damage by reason of reshipping in open cars, in the absence of evidence that the shingles were damaged on arrival at the first destination in Illinois.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered July 7, 1911, upon findings in favor of the defendant, in an action in tort, after a trial to the court. Affirmed.

*Walter Metzenbaum* and *Walter Schaffner*, for appellant.  
*F. V. Brown* and *F. G. Dorety*, for respondent.

MORRIS, J.—Action for damages to a shipment of shingles. The facts, except the damage to the shingles, are all admitted, and are as follows: On September 10, 1907, appellant delivered to respondent a car load of shingles, for shipment from Sisco, Washington, to Kankakee, Illinois. Respondent issued its bill of lading for the shingles, and routed them over its own line of railway, and the lines of the Chicago, Burlington & Quincy Railroad Company, Indiana, Illinois & Iowa Railroad Company, and the Chicago, Indiana & Southern Railroad Company, which lines form together a continuous line of railway from Sisco, Washington, to Kankakee, Illinois.

<sup>1</sup>Reported in 124 Pac. 389.

The respondent carried the shingles in an ordinary box car to the Minnesota Transfer station, and there delivered them to the C. B. & Q. Railroad Company, which road without the knowledge of appellant transferred the shingles from the box car in which it had received them to two open gondola cars, and forwarded the cars over its own and connecting lines to Kankakee, Illinois. After the transfer of the shingles to the C. B. & Q. Railroad Company, and before the arrival of the cars at Kankakee, appellant sold the shingles to the W. L. Scott Lumber Company, Norwich, New York, which in turn sold them to Steenland Bros., Palisades Park, N. J., and the appellant, without notice to respondent, instructed the Chicago, Indiana & Southern Railroad Company, the final connecting carrier named in the bill of lading and over whose line the cars would arrive at Kankakee, to divert them to Palisades Park, N. J. The C. I. & S. Railroad Company, upon receiving such instructions from appellant, issued a new bill of lading, reciting the shipment of these two cars of shingles from appellant at Kankakee to Palisades Park, N. J., and forwarded them over a new line of connecting carriers to their destination. The shingles arrived at Palisades Park, November 14, where acceptance was refused by the consignee, claiming the shingles were wet and damaged. The shingles were held by the Erie Railroad Company, over whose line they arrived at Palisades Park, until August, pending a settlement of the claim of damage, when they were sold at public auction for \$643.90. Appellant then brought this action, alleging the value of the shingles at \$768.70, their arrival at Palisades Park in a condition wholly worthless, and demanding a recovery against respondent as the initial carrier. Having failed of recovery in the lower court, it appeals.

Upon these facts we fail to comprehend upon what theory appellant can recover against respondent. Under its bill of lading, respondent contracted to safely carry and deliver the shingles at Kankakee, Illinois. Respondent assumed no

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other nor further obligation. There is no evidence in the case of, nor does appellant attempt to show, the arrival of the shingles at Kankakee in a damaged condition. Its whole theory of recovery is that respondent is the initial carrier, and hence liable for any damage to the shipment en route to its destination. If it should be so held, respondent's liability is coextensive with its undertaking, and that ended with the arrival of the shingles at the destination named in its bill of lading—Kankakee, Illinois. *Allen & Gilbert-Ramaker Co. v. Canadian Pac. R. Co.*, 42 Wash. 64, 84 Pac. 620. The liability of respondent as initial carrier could not be extended to include the shipment from Kankakee to Palisades Park, so as to render it answerable to appellant for any damage to the shingles upon this reshipment.

Appellant's argument is that, under the act regulating interstate commerce, ch. 3591, § 7, 34 U. S. Stats. 584, the initial carrier must issue a through bill of lading, and becomes liable to the shipper for all damages caused by any connecting line. It may be so conceded. This liability, however, cannot be extended beyond the contract evidenced by the bill of lading; and that is, to deliver the shipment at the place of destination therein named. Any damage to the shingles while en route from Kankakee, Illinois, to Palisades, N. J., under orders from appellant and without the knowledge of respondent, under a new bill of lading, cannot be recoverable against the initial carrier in the first bill of lading, whose contract and whose liability for damage, whether occurring upon its own line or that of any connecting line, cannot be extended beyond the destination fixed in the bill of lading. There must be some evidence of damage to these shingles at the time of their arrival at Kankakee, before there could be any recovery from respondent. The fact that the C. B. & Q. Railroad Company transferred the shingles from a box car to open gondola cars does not establish negligence, until there is some proof that such a method of shipment from Minnesota to Illinois points is of itself negligence. There

is no such evidence, nor any upon which such a contention can be based. The C. B. & Q. Railroad Company had no knowledge of appellant's intention to reship the shingles from Kankakee to Palisades Park. It might have believed that open cars for a shipment of shingles to Kankakee, Illinois, in September constituted a reasonably safe method of carriage. It might not have so believed had it known the shingles were to be forwarded from Kankakee to Palisades, N. J., and subject while so en route to the inclement weather naturally to be anticipated before their arrival at Palisades Park in due course of carriage. Neither could it be assumed that the Chicago, Indiana & Southern Railroad Company, when instructed to reship to Palisades Park, would forward in the same cars as received; any more than it could be assumed the latter road would follow the act of the C. B. & Q., and reload in its own cars for the further shipment. There is no evidence upon any of these points, and we can find no liability without some tangible evidence to support it. There is no need for further discussion, since with this view of the case a review of the evidence as to the damaged condition of the shingles is not necessary. We are, however, not strongly impressed with this claim of damage, when it is shown that the shingles, worth \$734.40 in September, 1907, sold at public auction in August, 1908, with prices fallen from \$3.15 to \$2.15 for clears and from \$2.70 to \$1.50 for stars, for \$643.90.

Upon the facts as presented, we believe the court below announced the correct judgment, and the same is affirmed.

ELLIS, MOUNT, and FULLERTON, JJ., concur.

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Opinion Per MOUNT, J.

[No. 10434. Department Two. June 20, 1912.]

BELKNAP GLASS COMPANY, *Respondent*, v. ROBERT  
BROWN *et al.*, *Appellants*.<sup>1</sup>

**MECHANICS' LIENS—CONTRACT—SUBSTANTIAL PERFORMANCE.** There is a substantial performance of a contract for the plate glass for a large building, entitling the contractor to a mechanics' lien, where only two plates, of the value of \$30, were faulty, and plaintiff offered to replace them or make a proper deduction.

**PLEADING—DENIAL OF INFORMATION—MATTERS OF RECORD.** A denial on information and belief that a mechanics' lien notice had been filed and recorded is insufficient to raise any issue thereon.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 13, 1912, upon findings in favor of the plaintiff, in an action to foreclose a mechanics' lien. Affirmed.

*William W. Wilshire*, for appellants.

*Gates & Emery*, for respondent.

MOUNT, J.—Plaintiff brought this action to foreclose a lien for labor and material furnished in the construction of a building for the defendants. The defense was that the plaintiff had not performed the contract. Defendants asked for damages on that account. The trial court found that the contract had been substantially performed, but deducted \$30 from the contract price on account of two plates of glass which were conceded to be defective, and entered a decree foreclosing a lien for \$432, with interest and costs, and also \$50 attorney's fee, for the plaintiff. The defendants have appealed, and argue that the court erred in finding that the contract had been substantially performed, and in permitting the lien notice to be received in evidence.

It appears that defendant Brown was constructing a large building, in Seattle, for the other two defendants. In July,

<sup>1</sup>Reported in 124 Pac. 390.

1911, Mr. Brown entered into a written contract with the plaintiff, whereby the plaintiff agreed to furnish and set into the building a stated number of plate glass of specified sizes, for the price of \$462. The written contract does not specify the quality of the glass, but it was conceded that the glass was represented to be first class. After the glass was set in the building, Mr. Brown objected to a number of plates because they were scratched and contained bubbles and other imperfections. Mr. Belknap, of the plaintiff company, examined the glass with Mr. Brown, and agreed that two of the plates were not proper, and offered to replace those plates. Mr. Brown insisted that, unless a number of other plates were replaced, the work and materials would not be accepted. Plaintiff company thereupon filed a lien and brought this action.

The main question in the case was whether the glass was first-class glass or not. The evidence of experts who examined the glass after it was set was absolutely conflicting. It is admitted that two of the plates were not first class, but that the plaintiff offered to replace these or to make a deduction of their value, which was shown to be \$15 each. But as to a number of the other plates, the testimony of the witnesses cannot be harmonized. During the trial, the judge, at the invitation of defendants' counsel, personally examined the glass, and in deciding the case, said:

"But after a careful examination of the premises, the court finds that the job is substantially a good job with the exception of those two windows in controversy. Even, I think, the statement was made in open court if the work had been as satisfactory as the one light subsequent to that time put in by Fuller & Company, that there would be no complaint. While I failed to see any scratches on the one light put in by Fuller & Co., it contains some globules or bubbles as the other one does, and it necessitated a pretty close examination to find the defects claimed. . . . It occurs to the court that there has been a substantial compliance with the terms of the contract . . . and if the two plates, ad-

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mitted to be objectionable, had been as good as the rest were, I would consider it a complete performance.”

After a careful reading of the record, we think the trial court arrived at the correct conclusion.

Counsel for the appellant argues that the glass was salvage glass; that is, glass which had previously been used in other buildings; that it was scratched and imperfect. There is some evidence upon which to base this argument, but not enough to justify a reversal of the trial court in the face of competent evidence that the glass was first-class glass. Two of the plates were faulty, but the plaintiff offered to replace these. The defendants, however, refused to accept the work when this was done. The court made a just deduction for these, which was no doubt right.

When the original lien claim was offered in evidence, defendants' counsel objected, upon the ground that it was incompetent, irrelevant, and immaterial. It is conceded that the original contained an indorsement by the county auditor that it had been filed and recorded in his office. It is now argued that the lien claim is incompetent because it contained no certificate of the county auditor that it was filed and recorded in his office. The allegations in the complaint in regard to the filing of this lien claim were denied upon information and belief only. We held in *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752, that this kind of a denial was insufficient. No issue was, therefore, made by the pleadings or at the trial upon the fact that the lien notice was properly filed and recorded.

We find no error. The judgment is therefore affirmed.

ELLIS and MORRIS, JJ., concur.

[No. 10376. Department Two. June 20, 1912.]

GRACE N. CATTON, *Respondent*, v. WILBUR F. CATTON *et al.*,  
*Appellants*.<sup>1</sup>

DIVORCE—DECREE—DISPOSITION OF REAL PROPERTY—VENUE OF ACTION. In a divorce action, commenced in the county where the plaintiff resides, under Rem. & Bal. Code, § 984, the court has jurisdiction to dispose of real property situated in another county, where it is described in the complaint, under Id., § 989, authorizing the court to dispose of any property of the parties; and Id., § 204, providing that actions to recover real estate shall be brought in the county where the subject is situated, does not apply.

GAMING—CONTRACTS—MONEY LOANED—HUSBAND AND WIFE—COMMUNITY DEBT. Money loaned to a husband for the express purpose of gambling in futures in a manner prohibited by law cannot be recovered either from the husband or the community, and is therefore not a community debt.

Appeal from a judgment of the superior court for King county, John S. Jurey, Esq., judge *pro tempore*, entered August 31, 1911, upon findings in favor of the plaintiff, in an action for divorce. Affirmed.

*Stallcup & Keyes*, for appellants.

*Julius L. Baldwin*, for respondent.

MOUNT, J.—The plaintiff brought this action on February 15, 1911, for a divorce from her husband. The action was brought in the superior court of King county, where the plaintiff resided. It was alleged in the complaint that the community owned certain described real estate in Grant county, certain other described real estate in Pierce county, and also certain described personal property in King and Pierce counties, all in this state, all of which property was community property. The prayer, among other things, was for a restraining order to prevent the defendant Catton from disposing of any of the property. A temporary restraining

<sup>1</sup>Reported in 124 Pac. 387.



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order was accordingly issued. The defendant Catton was not served with process until February 18, 1911. On the 16th day of February he transferred his personal property in Pierce county to one Shrewsbury, and on February 17, 1911, he was sued by John J. Reehling in Pierce county, upon two promissory notes aggregating \$1,700. He immediately confessed judgment, and execution was thereupon issued and levied upon the community property of the plaintiff and defendant Catton in Pierce county. On the next day, the defendant Catton was served with process in this action. Thereafter on March 10, 1911, the plaintiff filed a supplemental complaint, which brought Shrewsbury, Reehling and the sheriff of Pierce county into the case as parties defendant, and these parties were restrained from disposing of the property.

Upon a trial of the case, the court granted a decree of divorce to the plaintiff, and awarded her certain property. The court found, that the transfer of the personal property to Shrewsbury was fraudulent and void as to the plaintiff; that the notes upon which the action was brought by Reehling against defendant Catton in Pierce county were given for money which was "borrowed and used by said Catton for his separate use and not at all for the community of plaintiff and said Catton; that most or all of said money was borrowed and used for speculation in options and futures on stock and produce; that none of it was borrowed or used in the business of H. Robert Paul & Company, which was the only legitimate business in which said Catton was engaged during all such times; that said Reehling was in a position to know of all these facts and circumstances."

The defendant Reehling only has appealed, and argues two points, to the effect (1) that the superior court of King county had no jurisdiction over the real estate in Pierce county, and (2) that the finding above quoted does not support the conclusion that the judgment obtained by Reehling is not a community obligation.

It is quite plain, we think, that the superior court of King county had jurisdiction over the property in Pierce county, because this is an action for divorce. The plaintiff was a resident of King county. The statute provides, at § 984, Rem. & Bal. Code, that a plaintiff in such cases may file her complaint in the county where she resides. Section 989 provides that the court granting a divorce shall make such disposition of the property of the parties as shall appear just and equitable. This court has held that the court in a divorce action has power to award any part of the property of the parties as shall appear just, but to do so it is necessary that the property shall be brought before the court, and the proper way to do this is to describe the property in the pleadings. *Philbrick v. Andrews*, 8 Wash. 7, 35 Pac. 358; *In re Smith's Petition*, 9 Wash. 85, 37 Pac. 311, 494; *Budlong v. Budlong*, 43 Wash. 423, 86 Pac. 648. The disposition of the property of the parties is an incident to the divorce. Where the property is brought into the action by description, the court thereafter acquires jurisdiction over it. Otherwise it would be necessary to bring an action in each county where the parties may have property. This was not the intention of the statute. Section 204, Rem. & Bal. Code, which provides that actions for possession of, or affecting the title to, real estate shall be commenced in the county where the subject of the action is situated, clearly does not apply to divorce actions, because the residence of the plaintiff determines where such action shall be brought. The superior court of King county, therefore, had jurisdiction over the property of the parties in Pierce county.

Appellant next argues that the finding above quoted does not support the conclusion that the debt owing from defendant Catton is not a community obligation of plaintiff and her husband. The finding is specific that the money was borrowed and used by said Catton for his separate use, and not at all for the community of plaintiff and Catton. If the finding had stopped there, the contention now made would

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have no foundation whatever. But the finding continues: "That most or all of said money was borrowed and used in speculation in options and futures on stocks and produce . . .; that said Reehling was in position to know all these facts." Appellant argues that, because the proceeds of these speculations, if successful, would have been community property of Catton and wife, therefore the community was liable upon the notes for money borrowed for such purpose. The question is stated by appellant in his brief as follows:

"Where the husband borrows money and gives his negotiable promissory note therefor, using the proceeds thereof in dealing in futures—that is, buying and selling stocks on margins—does such an obligation create a separate debt of the husband, or does it create a community debt?"

It is apparently conceded—as the fact appears—that the defendant Catton borrowed this money from Reehling for the purpose of gambling in futures, and Reehling knew the facts. Catton lost the money. "By the weight of authority money loaned for the express purpose of gambling in a manner prohibited by law cannot be recovered back." 20 Cyc. 939. The debt, therefore, could not be collected from either the separate or community property of the plaintiff or her husband.

Appellant relies upon the case of *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022. That was a case where Johnson had obtained by fraud a sum of money from McGregor. We there held that, since the community consisting of Johnson and wife had received the benefit of money wrongfully obtained, the community was estopped from denying liability in a suit to recover the money. The rule in that case does not control this, because the community here received no benefit, and the obligation being a gambling obligation was not enforceable against either the plaintiff or her husband.

The judgment is therefore affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 9993. Department One. June 21, 1912.]

**FREDERICK LEBER, *Appellant*, v. KING COUNTY, *Respondent*.<sup>1</sup>**

HIGHWAYS—NEGLIGENCE—LIABILITY—COMPLAINT—SUFFICIENCY. A county is not required to maintain guard rails along a hillside county road, constructed fifteen feet wide and safe for ordinary travel, where there is no extraordinary condition or unusual hazard, and is therefore not liable for injuries caused by want of a railing, although it is alleged in the complaint that a frightened horse shied, lost his footing and fell eight or ten feet down a "steep incline and sheer decline and pitfall," there being no allegation that the bank was perpendicular or vertical.

Appeal from a judgment of the superior court for King county, Albertson, J., entered September 30, 1911, dismissing an action in tort, upon sustaining a demurrer to the complaint. Affirmed.

*William Parmerlee*, for appellant.

*John F. Murphy* and *Robert H. Evans*, for respondent.

PER CURIAM.—This is an action to recover damages for personal injuries. A demurrer to the complaint for want of facts constituting a cause of action having been sustained, and the plaintiff electing not to plead further, judgment of dismissal was rendered against him accordingly. From this disposition of the cause, the plaintiff has appealed.

The contentions of counsel require us to notice only the following allegations of the complaint:

"That the said defendant on the 31st day of August, 1910, and for a long time prior thereto disregarded its said duty in this, that on said date and for a long time prior thereto on the county road and public highway and about one-quarter of a mile east of the city limits of Kent, on that certain public road and highway known as the Black Diamond Road, and about 400 feet west from where the Molke Road branches off therefrom, said defendant so carelessly and negligently maintained and suffered to exist upon said highway, on the

<sup>1</sup>Reported in 124 Pac. 397.

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right-hand side thereof traveling eastward from Kent and not separated from said road and highway in any manner whatsoever, a steep, precipitous and sheer decline and pitfall of some eight or ten feet to the bottom thereof measuring from the level of said road and highway, and that the said defendant carelessly and negligently suffered and permitted said decline and pitfall to be and remain at said place without any protection to travelers and persons using said highway and negligently and carelessly failed to erect barriers or a railing or anything whatsoever to keep or prevent a traveler or his horse and wagon from being thrown and precipitated off of said road and down and over said steep bluff and declivity, and that said conditions above described had existed at said place with the knowledge of the said defendant for a long period of time before the plaintiff was injured thereat as hereinafter set forth.

"That on said 31st day of August, 1910, the plaintiff was driving his horse and wagon along said road at said place above described, which said road at said place is very narrow, not exceeding 15 feet in width, and the said plaintiff in order that other vehicles might pass was keeping to the right side of said road, and other persons and their teams and automobiles were about to pass the plaintiff in an opposite direction and the horse and buggy of plaintiff was compelled to take a position very close and near to said declivity and precipice and the horse of plaintiff in getting his position to avoid contact and collision with other vehicles, automobiles and horses on said road, shied or veered to the right and lost his footing and fell down and into said declivity and precipice, throwing the plaintiff from the seat of his said wagon a distance of some sixteen feet, where the plaintiff struck logs and other hard substances lying in said declivity.

"That by reason of there being no guard rails or other obstruction or barrier at said dangerous place to prevent said horse and wagon from falling over the same, and by reason of the carelessness and negligence of the defendant in maintaining and suffering its road to remain in said condition at said time and place the plaintiff was so thrown over said precipice and was injured."

It is at once apparent that the only negligence of the county relied upon by the appellant for recovery is the failure of the county to maintain a railing or barrier at the side

of the road next to the declivity, since no facts are alleged indicating other defects in the highway rendering it unsafe for travel by teams and vehicles. Appellant relies primarily upon the text of 15 Am. & Eng. Ency. Law (2d ed.), page 455, where it is said:

“If there is a dangerous place, however, such as a declivity or excavation, so close to the highway or to the traveled part thereof as to render the latter unsafe for travelers in the absence of a railing or barrier, the want of such railing or barrier constitutes a defect in the highway itself, for injuries from which the municipality is liable.”

This text was quoted with approval in *Neel v. King County*, 53 Wash. 490, 102 Pac. 396. That it was properly applied as the governing principle in that case there can be no doubt. The danger there was a washout so near the traveled highway as to make the danger obvious or unusual. The duty to put barriers upon a highway, although travel thereon be in a degree dangerous, is not absolute. The law does not require it unless the danger complained of is unusual. The text just quoted continues:

“But the danger which requires a barrier must be of an unusual character, such as a bridge, declivity, excavation, steep bank, or deep water, and a space adjoining a road or street may be left without a barrier though it is rough and entirely unsuitable for travel.”

The text continues:

“In determining the necessity of a barrier the primary question is whether the highway is safe without one, and this quite generally resolves itself into considerations of the character and proximity of the danger. The question of proximity is to be considered with reference to the highway as traveled or worked rather than as laid out. The general character of the road . . . may . . . be considered, . . .”

Here we have a road graded and in repair, fifteen feet wide, which is wide enough for all ordinary travel unless it be in the populous centers of the state. We think it will require no argument to make plain the fact that here there was no extra-

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ordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them, the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads and tend to the financial ruin of the counties undertaking to maintain the old ones. The unusual danger noticed by the books is a danger in the highway itself. It may become a question for the jury. Such was the condition in the *Neel* case.

The reasoning of the court in the case of *Adams v. Natick*, 13 Allen 429, is apt and unanswerable:

“Towns are not required to fence their roads with a view to prevent frightened animals from escaping out of the limits of the highway, even when the near location of a railroad may render such occurrences probable. Neither are they bound so to construct their roads that a horse, frightened by any cause, and rushing out of the track which is wrought for travel, will not expose himself nor the carriage and its occupants to injury from the embankments, gutters, or other obstructions upon the sides of the road, either within or without the limits of the highway. From the necessity of the case, by the forming of the road-bed, and the grading and draining necessary for its proper construction, the sides of the road will unavoidably be put into a condition which is unsuited to the rapid passage of horse and carriage transversely. But towns are not therefore required to guard against such occurrences by fencing up the road-bed, so as to prevent escape therefrom. They are bound to provide suitable railings against precipices, excavations, steep banks, deep water, etc., within or without the limits of the road, if they are so imminent to the line of public travel as to expose travelers to unusual hazard. It is difficult to define the extent of this obligation by any general proposition. Whether

or not such a railing is necessary for the reasonable security of the public is a question which depends very much upon the circumstances of the particular locality, in reference to which the question arises. But the essential and invariable term, or element, in all cases where a railing is required, is some dangerous object or place outside of the required railing, in or upon which the traveler may come to harm, if not warned or detained therefrom by the railing. The liability of horses to fright from the passage of railway trains nearby may render more imperative the necessity and the duty of maintaining a railing, wherever there is occasion for a railing. But whether the absence of a railing is a defect, and the neglect to maintain one a breach of duty which will render a town liable, must be determined by the character of the place or object, between which and the traveled road it is claimed that the barrier should be interposed."

We take it, then, that the rule contended for applies only where a traveler exercising ordinary care would not expect to find a danger, or where the natural or surrounding conditions would suggest protection; as, for instance, an obstruction in the highway or a washout, a sheer precipice, excavation, chasm, trestle, or a bridge, thus making the danger obvious or unusual. Some one of these conditions occurred in all of the following cases, and a recovery was allowed: *Neel v. King County, supra*; *Archibald v. Lincoln County*, 50 Wash. 55, 96 Pac. 831; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122; *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616.

The duty of the county is discharged if it maintains its highways reasonably safe for ordinary travel. In *Dignan v. Spokane County*, 43 Wash. 419, 86 Pac. 649, the team became suddenly frightened and jumped forward, so that the wagon tongue fell. The team started to run, the tongue sliding to the ground, the tongue caught under a loose and warped board in a bridge, overturning the wagon and injuring the plaintiff. But for the loose and warped board, the accident would not have happened as it did. The court laid down the rule, and we think it applies to this case:



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“To be reasonably safe for ordinary travel, a bridge does not have to be in such a condition that the tongue of a wagon dropped in front and pulled on to it front on, will slide over it without catching. If a bridge on a highway must be kept in that condition, then must all of the balance of the highway be kept in the same condition, as the bridge is of no more importance relatively than is the balance of the way, a burden, it is unnecessary to say, counties could not bear.”

We realize that this case comes to us on demurrer, and that plaintiff has said in his complaint that the defect was a “steep precipice and sheer decline and pitfall of some eight or ten feet to the bottom thereof,” and further that “the horse shied and lost his footing and fell down and into said declivity and precipice.” If the bank was perpendicular or vertical, it seems to us that the plaintiff might have said so. The words he has used to describe the condition all bear a more favorable meaning, and if it had been possible for him to allege a condition requiring a barrier as a matter of law, we must assume that he would have done so. Declivity means a sloping bank. The words “steep” and “precipitous” do not imply or suggest that the bank was vertical, and the words “sheer decline” as employed here are contradictory of each other. We met a similar situation in the case of *Goldie-Klenert Distributing Co. v. Bothwell*, 67 Wash. 264, 121 Pac. 60, where we said:

“The circuitous method adopted by the pleader indicates an effort to avoid a direct averment of these facts rather than to plead them.”

No unusual condition or obvious danger being pointed out in the pleadings, there can be no recovery, and the judgment of the lower court is affirmed.

[No. 10414. Department One. June 21, 1912.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v.  
WILLIAM R. SHOEMAKE *et al.*, *Respondents*.<sup>1</sup>

APPEAL—JURISDICTION—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—EFFECT OF COUNTERCLAIM. Under Const., art. 4, § 4, denying jurisdiction to the supreme court in actions at law for the recovery of money when the original amount in controversy does not exceed the sum of \$200, the supreme court has no jurisdiction of an appeal in an action to recover demurrage charges in the sum of \$105, in which the defendant claimed to be entitled to the charge and filed a counterclaim in the same sum; the original amount in controversy being the amount claimed by either party, and not the sum of the two claims.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered February 15, 1912, upon findings in favor of the defendants, upon an agreed statement of facts, in an action for demurrage charges. Appeal dismissed.

*Geo. T. Reid, J. W. Quick, and L. B. da Ponte*, for appellant.

*Browder D. Brown (J. W. A. Nichols, of counsel)*, for respondents.

Gose, J.—The plaintiff brought this suit to recover the sum of \$105, demurrage charges for the detention of three loaded cars for thirty-five days each at one dollar per day per car, and \$4.25, the cost of unloading the cars. The defendants pleaded a counterclaim for demurrage charges in a like amount, and for damages. The case was submitted to the trial court upon an agreed statement of facts. The facts essential to a correct understanding of the case are these: The plaintiff is a common carrier of state and interstate freight and passengers. In pursuance of a written order therefor, it placed three cars on its loading track at Lacey

<sup>1</sup>Reported in 124 Pac. 385.

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station, which the defendant loaded with piling with instructions to ship to South Aberdeen. After the cars were loaded and before they could be moved, the plaintiff was served with certain notices of liens claimed upon the piles for labor performed in cutting them. The plaintiff promptly notified the defendants thereof, and advised them that it could not move the cars as directed. The defendants refused to satisfy the liens or to unload the cars, but demanded that they be shipped according to instructions. After the cars had been loaded and standing in the station at Lacey for thirty-five days beyond the forty-eight hours allowed by law, the plaintiff unloaded the cars at a cost to it of \$4.25. It was further stipulated that, if the court held that the plaintiff had a lawful right to refuse to move the cars in consequence of the filing and serving of the lien notices, a judgment should be entered for it for the amount claimed. Otherwise the judgment to be entered for the defendants. Upon these facts, a judgment was entered in favor of defendants for their costs, and their counterclaim was dismissed.

The first question presented is one of jurisdiction. Section 4, article 4, of the constitution, provides that the appellate jurisdiction of this court "shall not extend to civil actions at law for the recovery of money or personal property, when the original amount in controversy or the value of the property does not exceed the sum of \$200," etc. The appellant thus concretely states its contention:

"Under these pleadings it was competent for the court to have rendered a judgment in favor of appellant for \$105 and against respondents on their counterclaim, or in favor of respondents on the counterclaim for \$105 and against appellant dismissing its cause of action. In either case the pecuniary loss to the losing party would be \$210, viz., the difference between collecting \$105 and paying out \$105, or \$210."

While the reasoning is ingenious, we do not think it is sound. We think that, when the framers of the constitution used the words "original amount in controversy," they had reference to the amount severally claimed by the respective

parties in their pleadings. They did not mean that, if the sum of the opposing claims exceeded \$200, the court would have appellate jurisdiction. When an action is commenced, the amount sued for is the test of jurisdiction. If the adverse party asserts a counterclaim, he to that extent becomes an actor, and in so far as the question of jurisdiction is involved, he will be treated as if he were commencing an independent suit. We do not think the view urged by the appellant is a correct interpretation of the constitution. The contention that the defeated party would lose \$210, "the difference between collecting \$105 and paying out \$105, or \$210," is not sound. The law frequently denies a suitor a part or the whole of his claim, but this is upon the ground that he has no claim which the law recognizes. This view we think harmonizes with the decisions of this court. *Bleecker v. Satsop R. Co.*, 3 Wash. 77, 27 Pac. 1073; *Fidelity & Deposit Co. v. Faben*, 51 Wash. 308, 98 Pac. 764; *Lauridsen v. Lewis*, 47 Wash. 594, 92 Pac. 440. In the *Bleecker* case the words "original amount in controversy" were construed to mean "the amount sued for." In the *Faben* case the court, in construing these words, said:

"It seems manifest from a consideration of the above definition that the amount in controversy to which the appellate jurisdiction of this court extends must be that which was in actual dispute in the beginning before the action was brought, . . ."

In the *Lauridsen* case, the court quoted with approval from 1 Ency. Plead. & Prac., p. 734, as follows:

"When the defendant files a counterclaim in the trial court and then appeals from a judgment against him, he occupies substantially the position of a plaintiff appealing from an adverse judgment, and therefore the amount so claimed affirmatively by him becomes the appellate amount in controversy."

The appellant, in support of its contention on this question, has cited *Lister v. Campbell* (Tex. Civ. App.), 46 S. W. 876; *Winder v. Weaver* (Tex. Civ. App.), 37 S. W.

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876, and *Lake Shore & M. S. R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119. The first two cases were decided by the court of appeals of Texas. The last case was decided by the appellate court of Indiana. In each of these cases the appellate jurisdiction was sustained by adding the plaintiff's claim to the defendant's counterclaim for damages. They are seemingly based upon statutes which used the words the "amount in controversy." Whether the difference in phraseology would justify the divergent views we need not consider. The soundness of these cases is not so apparent as to incline this court to adopt their views. The real dispute here is which party is entitled to the demurrage charge of \$105.

The appeal is dismissed for want of jurisdiction.

CHADWICK, PARKER, and CROW, JJ., concur.

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[No. 10180. Department Two. June 22, 1912.]

FRED HUMMEL, *Respondent*, v. C. H. PETERSON *et al.*,  
*Appellants*.<sup>1</sup>

ADJOINING LANDOWNERS—LATERAL SUPPORT—DAMAGES. Damages may be recovered for the removal of lateral support by an excavation made by an adjoining landowner regardless of negligence in making the excavation, in view of the provision of the state constitution that "no private property shall be taken or damaged for a public or private use without just compensation having been first made."

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 3, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

*Peterson & Macbride*, for appellants.

*Daniel Landon, Chas. D. Fullen, and Jas. G. Raley*, for respondent.

<sup>1</sup>Reported in 124 Pac. 400.

MORRIS, J.—Respondent brought this action to recover damages for the removal of lateral support. The property of both respondent and appellants is situate upon a hillside having a slope of about forty-five degrees. Appellants own the lower lot, and between their lot and that of respondent there is an ungraded thirty-foot street. It is unnecessary to state the facts, since the only question arising upon the appeal is one of law which is in no way controlled by any of the facts in the case other than those disclosing the relative location of the respective lots, the excavation on appellants' lot, and the consequent sliding or caving in of respondent's lot.

The appeal is taken because of the alleged error of the trial court in refusing to hold that a recovery could be based only upon the negligence of appellants in making the excavation, and in submitting the case to the jury upon the theory that, if the act of appellants in making their excavation caused the lot of respondent to slide, and the injury to respondent's property was the proximate result of appellants' act, then respondent could recover. That such is the correct rule of law in this state can hardly be doubted, since the decision in *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 Pac. 18, 111 Am. St. 1027, 5 L. R. A. (N. S.) 1086, where it was held that the liability in cases of this character does not depend upon the degree of care or skill used to prevent damages, but that the liability is the same whether the damage is caused with or without negligence; the reason being that, for any physical injury or direct invasion of property rights, damages are recoverable, under the provisions of our constitution that "no private property shall be taken or damaged for a public or private use without just compensation having been first made." Any further discussion of the question would only be a repetition of what is said in the *Farnandis* case, which is controlling here, and for which reason the judgment is affirmed.

FULLETON, MOUNT, and ELLIS, JJ., concur.

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[No. 10157. Department Two. June 24, 1912.]

**DELIA E. CASTOR, *Appellant*, v. K. MURAMOTO, *Respondent*.**<sup>1</sup>

MORTGAGES—MATURITY—DEFAULT IN INTEREST—CONSTRUCTION OF CONTRACT. A mortgage matures and may be foreclosed for the whole sum, upon default in the payment of annual interest, where the mortgage note provided for interest payable annually “and if not so paid to become a part of the principal and bear interest until so paid,” and the mortgage provided for its foreclosure in case of any default in the payment of interest when the same becomes due under the terms of the note, and further stipulated that in case of foreclosure, “the whole of said principal and interest, whether the same shall be then due or not” shall be retained.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 27, 1911, dismissing an action for the foreclosure of a mortgage, upon sustaining a demurrer to the complaint. Reversed.

*B. W. Coimer*, for appellant.

*Carkeek, McDonald & Kapp*, for respondent.

MORRIS, J.—In an action to foreclose a mortgage for default in the annual payment of interest, the court below sustained a demurrer to the complaint, and dismissed the action; holding that, under the terms of the mortgage, the action was prematurely brought. This is the only question presented by the appeal.

The note for which the mortgage was given as security, and the mortgage, must of course be read and construed together in determining the contract of the parties and their relative rights thereunder. By the terms of the note, it is provided that the principal sum is payable on or before five years after date, “with interest from date until paid at the rate of ten per cent per annum, interest payable annually, and if not so paid to become a part of the principal and

<sup>1</sup>Reported in 125 Pac. 153.

bear interest until so paid." The mortgage recites that it is given to secure the payment of \$4,233,

"together with interest thereon at the rate of ten per cent per annum from date until paid, according to the terms and conditions of one certain promissory note . . . and these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or interest of said promissory note or any part thereof, when the same shall become due and payable according to the terms and conditions thereof, then the said party of the second part, her executors, administrators, and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale to retain the whole of said principal and interest whether the same shall be then due or not, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns . . . The above-mentioned note is for \$4,233, with interest at ten per cent, payable on or before five years, interest payable annually."

The argument in support of the demurrer is that, since the note provides that, in case of default in the payment of interest, the interest shall immediately become a part of the principal and bear like interest until paid, and contains no provision that, in case of a default in the payment of interest, the whole sum shall become due and payable, and the mortgage providing for a sale only in case default be made in the payment of the principal or interest, according to the conditions of the note, there is no time prior to the maturity of the note when foreclosure could be had; and that appellant's only remedy, in case of default in the payment of interest, is to have the same become part of the principal and draw like interest. Such a contention, it seems to us, fails to give due consideration to the terms of the note and mortgage when read as a whole. It is plain from the note that the interest is payable annually. If, then, it be not so paid,



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there is a default in the payment of interest according to the terms of the note. The mortgage provides for its foreclosure in case of any default in the payment of interest when the same becomes payable under the terms of the note, and the retention, out of the moneys arising from the foreclosure sale, of the whole of the principal and interest, whether the same shall be then due or not. If respondent's contention be true, this last provision of the mortgage is meaningless, since the only time the mortgage would be subject to foreclosure, irrespective of prior defaults in the payment of interest, would be a default in the payment of the original and the increased principal with the last annual interest at the maturity of the note, when under all theories all sums payable under the note and mortgage were subject to default for nonpayment. What need, then, for stipulating that, in case of a foreclosure, "the whole of said principal and interest, whether the same shall be then due or not," shall be retained? If the only foreclosure can take place subsequent to the maturity of the note, what sum is it, not then due, that is to be retained in case of a sale because of a default in the payment of principal or interest? Manifestly such a clause in this mortgage is indicative of the intention of the parties that the mortgage did stipulate for its foreclosure prior to the maturity of the note, in case of any default in the payment of the annual interest; as such a foreclosure could be the only one when the whole of the principal and interest would not be due; which situation is further illustrated by describing the note as one in which the interest is payable annually. Again, the mortgage provides for its foreclosure in case of any default in the payment of principal or interest, when the same is payable under the note. The note says the interest is payable annually. If the interest be not so paid, it is a default in the payment of interest, and a default subjecting the mortgage to foreclosure.

Respondent relies upon *Bank v. Doherty*, 29 Wash. 233, 69 Pac. 732, 92 Am. St. 903; *Van Loo v. Van Aken*, 104 Cal.

269, 37 Pac. 925; *Wood v. Whistler*, 67 Iowa 676, 25 N. W. 847, and *Motsinger v. Miller*, 59 Kan. 573, 53 Pac. 869. None of these cases, nor any other that we have been able to find, supports this contention. In the *Bank* case, it was held that a mortgage could not be foreclosed for default in the payment of interest when the only condition for its foreclosure was contained in this provision: "Now if the said first party shall on or before maturity pay or cause to be paid the said note with interest that may be due thereon, then the foregoing conveyance shall be null and void; otherwise to be and remain in full force and virtue;" which was construed to mean that the debt was permitted to run until the maturity of the note and mortgage, and that the mortgage should stand as security for the principal or interest, and could not be foreclosed until there was a failure to pay the note at its maturity. Manifestly this would be so when the parties fixed the maturity of the note as the only time when a default would subject the mortgage to a foreclosure. The court there says it was within the power of the parties to have provided for a foreclosure in case of any failure to pay interest, but they failed to do so; and that, if the mortgage had contained a stipulation providing for its foreclosure in case of any failure "to pay said note, or the interest, or any part thereof, when due," a foreclosure might be had for default in the payment of interest.

Referring to the language of the mortgage under consideration, we find it does contain the very thing the court in the *Bank* case says is essential to a foreclosure on default in the payment of interest. It says: "In case default be made in the payment of the principal or interest of said promissory note or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof." The note providing for the payment of interest annually, the failure to pay the interest when due is a default in the payment of interest, and a default in the payment of interest subjects the mortgage to a foreclosure.

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And making this intention still plainer, comes the further stipulation that, in case of any such foreclosure, the whole of the principal and interest represented by the note shall be retained, even though it be not yet due. In order to be any sum "not yet due," the sale must be prior to the maturity of the note and mortgage. The *Bank* case, with the authority therein cited, is in direct conflict with the ruling complained of, and is of itself sufficient to support the claim of error.

The case, however, having been argued so confidently upon the authority of the *Van Loo*, *Wood* and *Motsinger* cases, *supra*, we will review those cases and show them not to support the contention claimed. *Van Loo v. Van Aken* is a California case, where the note, as in the case at bar, provided for the payment of interest annually, and if not so paid to draw interest the same as the principal. The mortgage, however, provided for its foreclosure only in case of default at maturity. The reasoning of the court is that the mortgage is not given to secure the payment of the note according to its terms, but only as security for the payment of the principal sum and interest on the date of the maturity of the note. The mortgage in suit contains the very provision the mortgage in that case failed to contain, and hence that case is of no value to respondent. That the rule he contends for is not the law in California, but that the rule there is as we are attempting to here announce it, is clear from the following authorities: *Brickell v. Batchelder*, 62 Cal. 623; *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838; *Clemens v. Luce*, 101 Cal. 435, 35 Pac. 1032; *Phelps v. Mayers*, 126 Cal. 549, 58 Pac. 1048.

In the next case, *Wood v. Whistler*, neither the notes nor mortgage provided for the payment of interest annually. They simply provided that, in case it was not so paid, it should draw interest. Manifestly, unless the notes provided for the payment of interest annually, the failure to so pay would not be a default. In the case before us, as we have

before seen, the note does provide that the interest shall be paid annually. The case is not, therefore, in point. The next case is *Motsinger v. Miller* from Kansas, a case similar to the *Wood* case, the note providing that, if the interest was not paid annually, it should be added to the principal. There was, however, no provision in the note that the interest should be payable annually, and the court simply holds that the provision, "if interest be not paid annually, to become as principal," cannot be regarded as a promise to pay interest annually. It will thus be seen the case is not controlling when the note, as in the present case, contracts to pay annual interest. The court in its reasoning said:

"If the interest was payable annually, the default in the payment of the same makes the whole debt, and entitles Miller to a foreclosure of his mortgage."

In other words, if, as in the case at bar, the note made provision for the payment of interest annually, a foreclosure could be had for its nonpayment. That we are in full accord with the Kansas rule is plain from the reasoning of the *Motsinger* case and from *Meyer v. Graeber*, 19 Kan. 165, where the note provided for the payment of interest, and the mortgage recited that the interest was payable annually, and if not so paid, to be added to the principal; and that, in case of a default of any payment of principal or interest, foreclosure might be had; and it was held that the interest was to be construed as payable annually, although not as stated in the note, and that in case of default in its payment the mortgage might be foreclosed.

The judgment is reversed, and the case remanded with instructions to overrule the demurrer, and for further proceedings.

FULLERTON, MOUNT, and ELLIS, JJ., concur.

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[No. 10115. Department Two. June 24, 1912.]

CHARLES L. HAGGARD, *Respondent*, v. JOHN SANGLIN,  
*Appellant*.<sup>1</sup>

BILLS AND NOTES—MATURITY—ELECTION—LIMITATION OF ACTIONS—ACCRUAL—CHATTEL MORTGAGES—DECREE BEFORE MATURITY OF DEBT—EFFECT. A proceeding by a chattel mortgagee to preserve his security, under Rem. & Bal. Code, § 1112, providing that, where the debt is not due and the mortgagee has reasonable ground to believe that his debt is insecure etc., he may have the property taken from the possession of the mortgagor and sold, does not have the effect of an election to declare the whole debt due or accelerate the maturity of the debt, where he did not allege such an election, the notes did not provide for an acceleration of the maturity of the debt in such case, and the judgment merely applied the sum realized from the sale of the property in payment of the notes past due “without prejudice to the rights of the plaintiff to bring an action against the mortgagor not satisfied by this decree;” hence an action on the unpaid notes is not barred until six years after their maturity.

Appeal from a judgment of the superior court for King county, Prigmore, J., entered June 10, 1911, in favor of the plaintiff, upon stipulated facts, in an action on contract. Affirmed.

*Herbert W. Meyers* and *Charles A. Enslow*, for appellant.

*Higgins, Hall & Halverstadt* and *William E. Froude* (*Hyman Zettler*, of counsel), for respondent.

MOUNT, J.—The question presented in this case is whether the six-year statute of limitations has run against seven promissory notes sued upon. The trial court held that the statute had not run, and entered a judgment for the plaintiff. The defendant has appealed.

The facts are stipulated. It appears that, on July 14, 1902, the defendant executed and delivered to W. W. Wheaton thirty promissory notes, each for the sum of \$50, the first note maturing one month after date, the next two

<sup>1</sup>Reported in 124 Pac. 373.

months after date, and so on until the last, which matured thirty months after date. On the same day, the defendant executed and delivered a chattel mortgage to secure the payment of the notes. On July 22, 1902, Mr. Wheaton, for value, sold and transferred the notes and mortgage to the plaintiff. On July 29, 1902, plaintiff brought an action in the superior court of King county to foreclose the mortgage, setting out in the complaint "that the said plaintiff Charles L. Haggard had reasonable cause to believe, and does believe, that the mortgaged property is being destroyed and removed from the jurisdiction of the court." On November 23, 1903, the court in that case entered a judgment, finding that the plaintiff had cause to believe, and did believe, that the mortgaged property would be destroyed or removed before the maturity of the debt, and also finding that the property had been sold by a receiver appointed by the court, and that \$657.97 had been realized upon such sale, and also that fifteen of the notes were at that time past due, and ordered that the money so realized be paid to plaintiff. The decree also recited:

"It is further ordered that this decree is without prejudice to the rights of the plaintiff to bring an action against the mortgagor not satisfied by this decree."

Since that time, no payments have been made upon the indebtedness. This action was begun on June 29, 1910.

The contention of the appellant is that, because the action to foreclose the mortgage was brought before any of the notes were due, this constitutes an election to declare the whole debt due, and therefore the statute began to run against the whole debt at that time. He relies upon *Coman v. Peters*, 52 Wash. 574, 100 Pac. 1002, where we said:

"This court . . . has made no distinction between a case where there are words of option in the mortgage or agreement and cases where there are none, so far as the duty of the payee is concerned, in electing to declare the whole debt due in order to effect the maturity of the debt; and

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has held that in neither case would the whole debt become due upon default without some affirmative action indicating an election on the part of the payee."

And, also, upon *Gunby v. Ingram*, 57 Wash. 97, 106 Pac. 495, 36 L. R. A. (N. S.) 232, where we said: "We have decided that the commencement of an action before the tender of the amount due was one way in which such option could be exercised," and other cases of that character.

We think that rule is not applicable to this case. The mortgage in this case did not provide for an acceleration of the maturity of the debt, and none of the notes were due when the action was begun. The plaintiff evidently proceeded under the provisions of § 1112, Rem. & Bal. Code, which provides that, where a debt is not due and where the mortgagee has reasonable ground to believe that his debt is insecure, and that by allowing the property to remain in the hands of the mortgagor he would be in danger of losing his debt or security, he may have the property taken from the possession of the mortgagor and sold. This is apparently what was done. The plaintiff in that action did not allege that he elected to declare the debt due, and the decree therein did not declare the debt due or give judgment therefor. It ordered the money received from the sale of the mortgaged property to be applied on the notes then past due, and reserved the right to plaintiff to bring another action for the part not satisfied. It seems plain, therefore, that the action was not one upon the debt, but was one to preserve the security merely.

The appellant argues that the action was brought under § 1111, Rem. & Bal. Code. That section provides for the recovery of the debt. We have just seen that this action was not brought for that purpose, and was not treated as such, but was to preserve the security to the plaintiff. We are satisfied that the maturity of the notes was not affected by the action to foreclose the mortgage in order to preserve the security, and that the notes, which matured on their face

within six years prior to the present action, were not barred by the statute. This point is directly decided in *Hall v. Jameson*, 151 Cal. 606, 91 Pac. 518, in harmony with our views upon the subject.

The judgment is therefore affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

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[No. 10426. Department One. June 24, 1912.]

GRANVILLE TURNER, *Appellant*, v. AMERICAN CASUALTY  
COMPANY, *Respondent*.<sup>1</sup>

INSURANCE—ACTIONS ON POLICY—PLEADING—REPLY—DEPARTURE. In an action upon a policy of accident insurance, in which the defendant pleaded warranties in the application and breaches thereof, in that plaintiff had an atrophied leg, warranted as sound except for a slight weakness in the ankle, it is not a departure for the plaintiff to reply that he had an atrophied leg, which he disclosed to the agent and to deny that it was a bodily infirmity except to the extent mentioned in the application, i. e., a slight weakness in the ankle.

INSURANCE—ACTIONS ON POLICY—PLEADING AND ISSUES—BREACH OF WARRANTY—BURDEN OF PROOF. In an action upon a policy of accident insurance, in which the defendant alleged a breach of warranty, in that plaintiff had an atrophied "skeleton" leg much smaller and weaker than the other, which plaintiff had warranted as sound except for a slight weakness in the ankle, a reply admitting an atrophy of the leg and a diminution in its size, but denying that it caused any infirmity other than a weak ankle, as stated in the application, raises an issue of fact for the jury, and it is error to rule, as a matter of law, that the reply admits a breach of warranty; the burden of proving the breach of warranty being upon the defendant.

INSURANCE—WARRANTY—BREACH—WAIVER—KNOWLEDGE OF AGENT. Where the insured fully and truthfully disclosed his condition to the insurance agent who procured the policy, a warranty clause in the policy will not be held breached for a cause known to the agent before the application was signed, since the knowledge of the agent

<sup>1</sup>Reported in 124 Pac. 486.



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is the knowledge of the principal, and the company will be held to have waived the written warranties in so far as they are not in harmony with the facts disclosed.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 23, 1911, in favor of the defendant by direction of the court, in an action upon an accident insurance policy. Reversed.

*J. A. Sorley*, for appellant.

*Fred S. Fogg and Hayden & Langhorne*, for respondent.

GOSE, J.—This is a suit upon an accident insurance policy. The policy was issued to the plaintiff in March, 1908. The application for the policy contains the following applicable provisions:

“I hereby apply for a policy of insurance against disability. Said policy to be based upon the following statement of facts: I have never had . . . any bodily . . . infirmity or disorder, or any latent or apparent defect or deformity, except as herein stated. Slight weakness in left ankle. . . . I have never suffered the loss of . . . a hand or foot or the use of either except as herein stated. . . . I am in sound condition . . . physically, except as herein stated. . . . It is understood and agreed that I have made each of the above answers as a material representation to induce the issue of a policy for which I have made application, and to that end I warrant each of them to be full, complete and true, and declare that no statement contradictory thereto was made by me to the agent of said company. . . . I understand that the agent presenting this application has no power to make or renew any contract or insurance, or to waive or vary any part of this stipulation.”

The defendant in its answer admitted the issuance of the policy, and alleged in paragraph 2 of its affirmative answer that, at the time the policy was issued, the plaintiff,

“had an atrophy of the left leg, caused by the dislocation of his left hip, and that at said time his said left leg was very much smaller than his right leg. In fact and in truth, his said left leg was practically what is known as a ‘skeleton’

leg from the knee down to the foot; and that said plaintiff wilfully and knowingly and for the purpose of working a fraud on this defendant, concealed the fact from defendant that, at the time he signed said schedule of warranties, and at the time said policy of insurance was issued, he was suffering from an atrophy of the left leg, caused by the dislocation of the hip; and that in fact and in truth, at the time of the signing of said schedule of warranties, and at the time of the issuance of said policy of insurance, said plaintiff was not in sound condition mentally and physically, as is stated by him in warranty 19 as contained in the schedule of warranties heretofore set out in this answer."

In paragraph 4 it alleged that, at the time the application was signed and the policy issued, the plaintiff was a contractor, working on and around buildings where the full use of all the members of his body unimpaired by disease or injury was essential; that he was then suffering from an atrophy of the left leg, and that the left leg was not as strong as the right leg, and that it was not as strong as it would have been had it been normal and free from deformity and infirmity.

In his reply the plaintiff denied all of paragraph 2, except that he alleged that, at the time of making the application, he fully informed the defendant's agent who procured the insurance, "that he had an atrophy of the left leg, and that he then and there showed the said agent both his legs, and pointed out the difference in size, and told the said agent that it was caused by having his left hip dislocated." He denied paragraph 4, except that he admitted that he was a contractor by occupation, and that "his left leg was a little smaller than his right leg, caused by a dislocation of his hip." At the trial the plaintiff submitted evidence tending to show that he had regularly paid premiums on his policy, and that on December 4, 1909, while the policy was in force, he slipped and fell upon an icy street car step, and sustained injuries which caused a total disability. At the close of his evidence, on the motion of the defendant, a directed verdict

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was returned in its favor, and a judgment was thereafter entered for the defendant. The plaintiff prosecutes the appeal.

Pending the motion for a directed verdict, plaintiff moved for leave to reopen the case, and offered to prove that, at the time he applied for the policy and signed the application, he was in the office of the defendant in the city of Tacoma; that he told the agent that his left leg below the knee was smaller than the right leg; that the agent read the questions and wrote the answers; that he relied upon his writing correct answers; that the defendant and its officers thereafter, with knowledge of his actual condition, accepted the premiums, and did not offer to return them until after the commencement of the action. He further offered to prove by the plaintiff that his left leg, with the exception of a slight weakness in the ankle, was strong and free from infirmity. The court denied the application, and assigned as a reason that "the warranty was made and was false."

The respondent rests its right to an affirmance of the judgment upon three grounds: (1) It asserts that the averment in the reply that the appellant disclosed all the facts relating to his injury to the agent of the defendant who procured the insurance, is a departure from the cause of action stated in the complaint; (2) that the reply admits that the appellant had a bodily infirmity which is not disclosed in the written answers to his application; and (3) that the plaintiff cannot impeach the written warranties by parol evidence. These contentions will be considered in the above order.

In support of the first proposition, the respondent relies upon *Smart v. Burquoin*, 51 Wash. 274, 98 Pac. 666, and *Clemmons v. McGeer*, 63 Wash. 446, 115 Pac. 1081. In the *Smart* case the plaintiffs brought suit to recover the reasonable value of work and labor performed by them at the request of the defendant in plowing certain land owned by the latter. The defendant pleaded affirmatively that the

work was done under the terms of a lease which the plaintiffs had violated, and that they had abandoned the land. The plaintiffs in reply admitted that the work was performed under the lease, denied that they had broken its terms, and alleged affirmatively that the defendant had violated the terms of the lease by entering upon the land and ousting the plaintiffs from the possession thereof. We held that the plaintiffs, by the matter pleaded in the reply, sought to recover damages for the value of their leasehold estate, rather than the value of the services which were made the basis of recovery in the complaint, and that there was a departure. In the *Clemmons* case, a suit to quiet title to land, the complaint alleged title in the plaintiffs, and the answer alleged title in the defendant acquired through the plaintiffs. We held that the reply admitted facts which disclosed that the plaintiffs had no cause of action.

These cases are distinguishable from the case at bar. In this case the appellant relies upon the cause of action pleaded in the complaint, namely, the issuance and breach of the policy. The answer pleads certain warranties in the application, and alleges breaches thereof. The reply admits that the appellant had an atrophied leg, but denies that it was a bodily infirmity, except to the extent mentioned in the application, namely, a slight weakness in the ankle, and alleges affirmatively that he made a full and true statement of the facts to the respondent's agent before the policy was issued. In *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609, the court held that, to the plea of release in a suit upon a policy of insurance, the plaintiff may reply that the release was obtained by fraud. This case falls within the rule there announced. The effect of the affirmative matter in the reply here is that the respondent's agent failed to write the answers as given to him. There is no departure in the pleadings.

As to the respondent's second contention, the reply admits an atrophy of the left leg; that is, when read as an en-

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tirety, a diminution in its size; but in effect denies that it caused any infirmity other than a weak ankle. The court was in error in ruling as a matter of law that the reply admits a breach of warranty. It raised an issue of fact for the jury. The respondent, as we have seen, alleged that it was a skeleton leg, much smaller and weaker than the other leg. This was denied in the reply. The burden of proving the infirmity was upon the respondent. *Hoeland v. Western Union etc. Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Standard Life & Acc. Ins. Co. v. Martin*, 133 Ind. 376, 33 N. E. 105; *Home Mut. Life Ass'n v. Gillespie*, 110 Pa. St. 84, 1 Atl. 840; *Manufacturers Acc. Indemnity Co. v. Dorgan*, 58 Fed. 945; Richards, Insurance, § 181.

In the *Martin* case the insured answered in his application that he had never been ruptured "or otherwise physically injured;" that he had never been, and was not then, subject to bodily infirmity. It was shown that, while a boy, he had received an injury to the left foot, and that he was afterwards severely injured in the right leg. As to the left foot, the jury found that it caused him no inconvenience, except a slight limping, and that he could move about and walk as well as an ordinary man. As to the right leg, the jury found that it became and remained strong and sound. In considering this state of facts, the court said:

"It is impossible that the statement that the assured had never been 'physically injured' could be taken in a strict sense. That would preclude almost all insurance, for very few persons have not been at least somewhat injured at one time or another. Indeed, appellant admits this in its brief. The reasonable interpretation of the clause is that the decedent was at the time free from serious physical injury, and that any injuries which he may have suffered in the course of his previous life had disappeared, and left no trace behind that would render him an unfit subject for accident insurance; that he was, as to such accidents and their results, free from bodily ailments."

The same principle is announced in the *Hoeland* case.

Passing to a consideration of the third contention, it suffices to say that this court has steadfastly held that a policy will not be held void, nor will a warranty clause in a policy be held to have been breached, for a cause known to the agent before the application for the policy was signed, where the insured fully and truthfully related the facts to the solicitor, and false answers were written in the application by him. *Bothell v. National Casualty Co.*, 59 Wash. 209, 109 Pac. 590; *Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185; *Foster v. Pioneer Mut. Ins. Co.*, 37 Wash. 288, 79 Pac. 798; *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86. The following cases illustrate the view of this court on this and cognate questions: *Shultice v. Modern Woodmen etc.*, 67 Wash. 65, 120 Pac. 531; *Schuster v. Knights etc.*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. 905. The underlying principle of these cases is that the knowledge of the agent is the knowledge of the principal, without regard to whether the agent communicates the facts to it; that where the insured makes full and truthful statements to the agent who procures the policy of insurance, the insurer will be held to have waived the written warranties in so far as they are not in harmony with the facts disclosed, and that this court will determine the authority of the agent from the actual relations of the parties, rather than from the fictitious relations sought to be created by the recitals in the written instruments. (We are not unmindful of the fact that the Federal courts and other courts have taken a contrary view.) The substantive justice, however, of the view taken by this court from the beginning cannot be doubted. It gives notice to the insurance companies that they cannot turn loose upon the people a horde of incompetent or dishonest agents to exploit the policy holder, and then avoid the consequences of their acts by seeking refuge behind adroitly worded contracts.

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Opinion Per CHADWICK, J.

The judgment is reversed, with directions to proceed with the trial in conformity with this opinion.

PARKER and CROW, JJ., concur.

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[No. 10274. Department One. June 24, 1912.]

CARLSON BROTHERS COMPANY, *Respondent*, v. WEIDAUER & LANSDOWN SHINGLE COMPANY, *Appellant*.<sup>1</sup>

PAYMENT—BY NOTE OF THIRD PARTY—MISTAKE. The acceptance of a note from one company, for shingles sold to another company, under a misunderstanding of the fact that there were two companies with practically the same name, does not constitute a payment of the debt, or show that the debt was in fact the debt of the maker of the note, where the other company had ordered the shingles and the note was returned on discovery of the mistake; the legal effect of payment by note depending on the intention of the parties.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered December 2, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

*Merrick & Mills*, for appellant.

*Coleman, Fogarty & Anderson*, for respondent.

CHADWICK, J.—The only issue presented on this appeal is whether the sale of certain shingles was made by plaintiff to the Weidauer & Lansdown Shingle Company, or to the Weidauer & Lansdown Company, another corporation. A careful reading of the testimony convinces us that it would have been incumbent on us to follow the findings of the trial judge whichever way he decided the truth to be. We shall not, therefore, review the facts, or comment thereon, except in so far as it may be necessary to illustrate the only question of law occurring in the record.

<sup>1</sup>Reported in 124 Pac. 397.

The bulk of the shingles was sold on the written order of the Weidauer & Lansdown Shingle Company. The bill was not paid promptly, and plaintiff, at the solicitation of Mr. Weidauer, took a note due in thirty days for the whole amount due. This note was signed by the Weidauer & Lansdown Company. Some thirty days after the note became due, the Weidauer & Lansdown Company became bankrupt; and then, as Mr. Carlson, president of the plaintiff company, testifies, he found out for the first time that there were two companies. The note was returned to the maker, and payment of the account demanded of the shingle company. Payment was refused, and the note returned. Upon the trial, it was the contention of defendant that, notwithstanding the original order, for 250,000 of the 300,000 shingles sold by plaintiff, was given over the signature of the shingle company, in fact it was the debt of the Weidauer & Lansdown Company, as evidenced by the subsequent conduct of the parties; and that the acceptance and retention of the note signed by the Weidauer & Lansdown Company binds plaintiff to look to that company rather than to defendant.

It is our opinion, accepting the court's findings that the plaintiff dealt with the shingle company, that it never intended to take the note of a third party, the Weidauer & Lansdown Company; that its acceptance and retention of the note was under a misunderstanding of the fact that there were two companies with practically the same name. This court has frequently held that the legal effect of payment by promissory note is to be determined by reference to the true intent of the parties. *Walsh v. Cooper*, 10 Wash. 513, 39 Pac. 127; *Moon Bros. Carriage Co. v. Devenish*, 42 Wash. 415, 85 Pac. 17.

We find no error in the record, and the judgment is affirmed.

GOSE, CROW, and PARKER, JJ., concur.



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Opinion Per ELLIS, J.

[No. 10424. Department Two. June 24, 1912.]

HATTIE A. HEWETT, *Appellant*, v. FRANK O. DOLE *et al.*,  
*Respondents*.<sup>1</sup>

DEEDS—CONSIDERATION—EVIDENCE. Evidence examined and held to establish that part of the consideration for deeds was the assumption of specified debts of the grantor.

CANCELLATION OF INSTRUMENTS—FRAUD—EVIDENCE—SUFFICIENCY. Fraud by the grantee, as ground for the cancellation of deeds, must be proved by clear and convincing evidence, and is not shown by the mere breach of the vendee's contract to pay certain debts as part of the consideration; since the necessary preconceived intention not to perform is not established merely by subsequent failure to perform.

CANCELLATION OF INSTRUMENTS—ACTION FOR FRAUD—RELIEF—FAILURE OF CONSIDERATION—DAMAGES. In an action to cancel deeds for fraud, under a complaint asking general relief, the plaintiff may be given damages for partial failure of consideration although failing to establish the fraud.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 17, 1911, upon findings in favor of the defendants, dismissing an action for cancellation. Reversed.

*A. M. Abel* and *Geo. D. Abel*, for appellant.

*Bridges & Bruener*, for respondents.

ELLIS, J.—Action to rescind and cancel two transfers of property from the plaintiff to the defendant Frank O. Dole; one, a deed of certain real property in the city of Aberdeen, Washington, dated July, 29, 1911; the other, a bill of sale of certain furniture, dated August 5, 1911; on the alleged ground that both transfers were induced by fraudulent representations on the defendant's part. The plaintiff was a woman of considerable business experience, and had for some years prior to June, 1911, been engaged in the millinery

<sup>1</sup>Reported in 124 Pac. 374.

business, in Aberdeen, but at that time had discontinued it. She owned the real estate in question, and had fitted up the four houses thereon for renting as apartments. One Sjolseth held a mortgage upon the property, which at the time, with the unpaid interest, amounted to \$6,505. She owed many other debts which she was unable to pay. The only other real estate which she owned consisted of two timber claims in Klickitat county. These were mortgaged for sums aggregating \$2,500. These mortgages were in process of foreclosure, and with accrued interest and expenses amounted to \$3,176.80.

The defendant Frank O. Dole had for some years been engaged in the real estate, brokerage and loan business in Aberdeen. Early in June, 1911, the plaintiff applied to him to obtain a loan to take up her indebtedness, and though the evidence is conflicting as to what extent she divulged her financial condition, it seems probable that he then learned approximately the amount of her indebtedness. He visited her timber claims, endeavored without success to sell them, sought to induce the mortgagee to pay the plaintiff \$500 and accept a deed in satisfaction of the mortgages, which was refused, and finally advised the plaintiff to deed the claims to the mortgagee to avoid deficiency judgments. This also the mortgagee refused. Efforts to do anything with the timber claims were then abandoned. He had an interview with Sjolseth, who held the mortgage upon the apartment houses, and endeavored, also without success, to secure an additional loan. The plaintiff then authorized the defendant to sell the Aberdeen property, and finally suggested that he purchase it himself. He at first declined, stating that he was unable to do so, but after further consideration, consented provided he could get an extension of time upon the mortgage. He and the plaintiff visited Sjolseth, who agreed to an extension for two years, on condition that the defendant would assume the mortgage and pay the interest each month so that the debt might not increase. A written agree-

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ment to that effect was entered into between Dole and Sjolseth, on July 29, 1911.

On the same day the plaintiff deeded to the defendant the property in question, the recited consideration being one dollar "and other and further considerations," the assumption of the Sjolseth mortgage, and all lawful claims by judgment, attachment, or otherwise, and all taxes and assessments against the property. The deed reserved to the plaintiff the use of one of the houses for six months. A part of the furniture in the houses had been purchased by plaintiff on two conditional sale contracts, the remainder—but how much does not appear—was apparently encumbered by a chattel mortgage held by a Mrs. Hudson, for \$425. Upon what is called in the record the Kaufman & Company contract, she had paid \$195, leaving a balance of \$205 and interest; and upon what is called the Barker contract, she had paid \$50, leaving a balance of \$350 and interest. Shortly after the conveyance of the real estate, differences arose between the parties, and after some negotiation, the defendant, on August 5, 1911, secured from the plaintiff a bill of sale of the furniture. The recited consideration was one dollar and the assumption by the defendant of the amounts due upon the contracts. It is admitted that, at the time, the defendant paid the plaintiff \$100, which the defendant contends was an additional consideration for the furniture and for her relinquishing her right to the possession for six months of one of the houses reserved in the real estate deed. The plaintiff contends that it was solely in consideration of her surrendering possession.

The plaintiff testified that the defendant, for the transfer of the real estate, agreed to pay her \$1,000, pay the Hudson chattel mortgage of \$425, assume the Sjolseth mortgage of \$6,505, and pay her entire outstanding indebtedness, all of which she claims was then computed by the parties at \$13,000. She testified that, on the transfer of the personal property, she was to receive \$300 cash and the amounts

which had been paid by her upon the conditional sale contracts, and that the defendant was to assume payment of the balance due upon each of the contracts.

The defendant testified that, in addition to the considerations mentioned in the deed, he was to pay \$500 cash, and eight open accounts, aggregating about \$1,530. These accounts were mainly such as had been contracted by the plaintiff in remodeling the houses, and were lienable. There was a judgment referred to as the Bradshaw judgment for \$580.11, and a judgment referred to as the Staadecker & Company judgment, the exact amount of which does not appear. All of these items, amounting to near \$9,500, the defendant admits he agreed to pay as consideration for the deed of the real estate. A list of some ten accounts aggregating \$1,469.87, he disclaims ever having assumed, and testified that he never knew of them until after the transaction was closed. He testified that, by agreement with the plaintiff, he paid the \$500 agreed cash payment, by assuming the \$425 Hudson debt secured by chattel mortgage, and a discharge of a debt of \$75 due to him from the plaintiff for which he also held a chattel mortgage. As to the transfer of the personal property, he testified that the only consideration was the assumption of the indebtedness upon the conditional sale contracts, and the \$100 paid at the same time for the furniture, and a surrender of plaintiff's right of occupancy of one of the houses for six months.

The fraud alleged is that the defendant, while occupying a fiduciary relation to the plaintiff, induced her to make the transfers to him, by promising to pay all of the sums and obligations as claimed by her, he having at the time no intention of paying them; that the defendant was insolvent at the time, which fact was known to him but unknown to the plaintiff; that he induced her to have the papers drawn by his attorney without consulting an attorney of her own selection, and thus the true considerations and full agreements were never reduced to writing. The court found in

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favor of the defendant as to the consideration for both transfers, and that he practiced no fraud, and directed that the action be dismissed upon the defendant's giving security, either by mortgage upon the property or otherwise, for the payment of all claims and debts which were not liens against the property, which were admitted by the defendants to have been assumed by them. The judgment recites that the defendants have filed in court sufficient instruments in writing and receipts from all creditors of plaintiff whose debts defendants agreed to pay, not liens against the property, releasing the plaintiff from such debts, and have filed a release of the Hudson chattel mortgage for \$425; and dismisses the action, with prejudice, and awards the plaintiff her costs in the sum of \$103.80. The plaintiff appeals.

There are but two questions presented: What were the agreed considerations for the respective transfers? and, Were the transfers induced by fraud? On the question of consideration, there was no greater burden upon the appellant than upon the respondents. Both parties admitted that the instruments did not recite the true consideration. Neither relied upon the written instruments as expressing the true agreement. A wide latitude of proof was, therefore, open to both sides. A comparison of the testimony of the parties relative to the real estate transfer shows that the appellant claims that the following amounts were to be paid by the respondent, which respondent denies: \$1,000 cash to the appellant, the Hudson chattel mortgage of \$425, and a list of ten open accounts amounting to \$1,469.87. These three items, aggregating \$2,894.87, constitute the real difference between the claims of the parties as to the agreed consideration for the real estate transfer. While the mortgages on the Klickitat timber claims were referred to in evidence, there seems to be no serious contention that the respondent was to assume these.

The respondent contends that he did not know of the open accounts at the time of the transfer, and hence could

not have assumed their payment. The evidence shows, however, that he talked with an attorney, Boner, who had for collection claims amounting to some \$1,600 against the appellant, among them one which had been reduced to judgment and which the respondent admits he assumed. This was prior to the transfer. Boner testified that it was his recollection that they talked over the amount of the claims, and that he told respondent they amounted to about \$1,600. He did not give respondent a list of the accounts nor the names of the creditors. Respondent admitted that he had a conversation with Boner as to the judgment, but denied that other claims were mentioned. Henry Barker, senior member of the firm of Barker & Company, testified that the respondent, in the latter part of July or early in August, called on him to ascertain the amount unpaid upon the Barker conditional sale contract; that he then told Barker that he had bought the appellant's property, and,

"He said it was a good deal of work to straighten her accounts up. He had assumed a \$13,000 debt—about that—and it would be a great deal of work to straighten it up. He said the accounts were a mix-up. I said, 'How is that? Is she in debt much?' and he said, 'I will have to take up \$13,000; that is all.' "

The respondent denies this conversation, and Barker's son who was present says the debts were not mentioned. It does not affirmatively appear, however, that the son was present during the entire conversation. In addition to the corroboration of appellant furnished by the testimony of Boner and Barker, it must be remembered that the respondent had been, for about two months prior to the transfer, endeavoring to secure a loan or make a sale of appellant's properties, with a view to taking up her debts. It seems only reasonable to assume that she had then told him what those debts were, as she says she did. Moreover, there is no evidence that she had ever abandoned the original purpose of clearing up her debts by some disposition of this property. In view of the whole

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of the evidence and the situation and reasonable intention of the parties, we think there was a preponderance in favor of the appellant's claim, and that the disputed sums and accounts were to be paid by respondent as part of the consideration for the real estate transfer.

On the other hand, we find no such preponderance in appellant's favor as to the sale of the personal property. The furniture was all second hand. It is hardly reasonable to suppose that respondent would agree to pay the full cost price for any of it. The appellant was not corroborated by any evidence in her claim that the respondent, in addition to the \$100 paid at the time to secure possession of the property and an assumption of the unpaid part of the purchase price, was also to pay \$300 cash and repay to the appellant all sums which she had paid upon the two conditional sale contracts. As to the consideration for the transfer of the furniture, we find no sufficient basis in the evidence for disturbing the finding of the trial court.

There remains to be discussed the charge of fraud. It is elementary that one asserting fraud must prove it by clear and convincing evidence. There was no evidence that the respondent was, or is, insolvent. While in a sense he occupied a fiduciary relation to the appellant, there was no evidence that he abused that relation. If it was the agreement, as we think it was, that he should pay, in addition to the debts assumed in the deed, \$1,000 cash and the other debts as claimed by appellant, he agreed to pay a fair value for the property, as shown by the evidence of value which we deem it unnecessary to discuss. While the respondent's attorney did prepare the papers, it is undisputed that respondent offered to allow the appellant's former attorney to do that work. There is no evidence that the respondent did not enter into the contract in good faith, and with a then intention to pay whatever he then agreed to pay. The dispute arises as to what he then agreed to pay. Our finding in appellant's favor on this point does not import fraud into the

inception of the contract. The payment of these or any sums was not made by the deed a condition subsequent, the failure to perform which would defeat the deed. The failure to pay constituted, therefore, a mere breach of contract. The mere denial of liability and failure to pay was neither a failure of consideration nor a proof of fraud in the inception of the contract such as would entitle the appellant to a rescission. Her remedy was for damages for breach of the contract.

We have no doubt that the weight of authority sustains the appellant's contention that, if the promise is made merely as a means of deceiving and with no intention to perform, it constitutes such fraud as will support an action for deceit and entitle the injured party to a rescission. 20 Cyc. 22. *Brison v. Brison*, 75 Cal. 525, 17 Pac. 689, 7 Am. St. 189; *Cerny v. Paxton & Gallagher Co.*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640; *Atkins v. Atkins*, 195 Mass. 124, 80 N. E. 806, 11 L. R. A. (N. S.) 273.

We have, however, been cited to no authority holding that a preconceived intention not to perform is established merely by a subsequent failure or refusal to perform in the absence of antecedent insolvency, except in those cases where the consideration for the transfer was an agreement to support aged or infirm persons. Such cases constitute a recognized exception to the general rule. They usually involve a fiduciary relation of the most positive character. In such cases the promise to support usually constitutes the whole consideration, and the failure to perform may reasonably be held a total failure of consideration. In any event, the usually present flagrant abuse of the fiduciary relation, and the usual inadequacy of any other relief, impels a court of equity to grant a rescission "upon principles not applicable to ordinary conveyances." *Bogie v. Bogie*, 41 Wis. 209, 219; *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629; *Gustin v. Crockett*, 51 Wash. 67, 97 Pac. 1091. The case before us falls directly within the rule announced in *Lawrence v.*



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*Gayetty*, 78 Cal. 126, 20 Pac. 382, 385, 386, where the court said:

"It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants; therefore his promise was not dependent upon theirs; nor was there anything appearing in the deed, or in the contract under which it was made, showing or tending to show that a compliance with their promises was regarded as a condition subsequent, or that a failure to perform on their part should in any way effect the title conveyed to them. The case is precisely the same in principle as if the plaintiff had conveyed and taken a note for the purchase money, and the defendants had failed to pay the same. The fact that the promise is to expend money in making certain improvements instead of a promise to pay money to the plaintiff can make no difference as to the right to rescind on the ground that the grantees have failed to perform the covenants on their part. Certainly it would not be seriously contended that the mere failure by the vendee to pay the purchase money could entitle the vendor to rescind the contract and recover back the land; and yet that is the ground upon which the plaintiff in this action must recover under these findings, if at all . . . Such a rule may work hardship in individual cases, and this may be one of those cases; but to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed and recover the land, would render real estate titles dangerously uncertain, and result in the most serious consequences. The judgment is not sustained by the findings."

See, also, *Chicago, T. & M. C. Ry. Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472; Pomeroy, *Equity Jurisprudence*, vol. 6 (1905 ed.), § 686; Waterman, *Specific Performance*, § 189; *German Nat. Bank v. Princeton State Bank*, 128 Wis. 60, 107 N. W. 454, 6 L. R. A. (N. S.) 556, 8 Am. & Eng. Ann. Cases 502. We think the trial court correctly held that there was no such clear and convincing evidence of fraud as to warrant a rescission. The complaint, however, alleged, and the evidence established, facts sufficient to entitle the appellant to relief in damages, and the prayer was for general relief. The appellant is entitled to a judgment

for the \$1,000 cash payment, which we find the respondent agreed to make, less \$75 which appellant owed respondent, with interest on the balance at the legal rate from July 29, 1911; and also for the amount now due and unpaid upon the following accounts, which we find he also agreed to pay in addition to those disposed of in the original judgment:

“City Retail Lumber Co.; Ward T. Smith; R. A. Buell; B. O. Case & Co.; D. B. Fisk & Co.; Uhry & Co.; Jacobs & Co.; Carl T. Smith; G. H. Publishing Co. two accounts; The Grays Lithograph Co.; Quick Print Co.”

Since the evidence before us does not show the exact amount now due upon these claims, the cause is remanded with direction to the trial court to take evidence thereon, ascertain the amounts, and modify the judgment in accordance with this opinion.

MOUNT, MORRIS, and FULLERTON, JJ., concur.

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[No. 9383. Department Two. June 25, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.  
W. H. ROBINSON, *Appellant*.<sup>1</sup>

ELECTIONS—PRIMARY ELECTIONS—STATUTES—CONSTRUCTION. The primary election law, Rem. & Bal. Code, § 4837, only adopts provisions of the statutes with relation to the holding of elections, and not general criminal statutes which are no part of the election laws.

ELECTIONS—PRIMARY ELECTIONS—ELECTION OFFICERS—OFFENSES. Rem. & Bal. Code, § 4967, which provides that every person charged with the performance of any duty under the provision of any law of the state relating to elections who wilfully neglects to perform such duty shall be punished by fine or imprisonment, being an early general criminal statute not a part of any election act, is general in its application, and applies to the September primary election for the nomination of candidates, under the act of 1909, subsequently enacted; hence such officers may be prosecuted for malfeasance under § 4967.

<sup>1</sup>Reported in 124 Pac. 379.

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Opinion Per ELLIS, J.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered November 4, 1910, sentencing the defendant for malfeasance in office, upon his plea of guilty, upon overruling a motion in arrest of judgment. Affirmed.

*Gordon, Easterday & Askren*, for appellant.

*J. L. McMurray, A. O. Burmeister, and F. G. Remann*, for respondent.

ELLIS, J.—This is an appeal from a judgment convicting the appellant of the offense of malfeasance as an election officer. The information charged, in substance, that on or about September 13, 1910, the appellant and four others were election officers for the second precinct of the third ward, in the city of Tacoma, Pierce county, Washington, at the primary election held for the purpose of nominating candidates for county, state, and congressional offices; that the appellant was one of the clerks of the election, and with the other defendants was charged by the laws relating to primary elections with the duty of counting the ballots cast in that precinct for candidates for nomination on the republican ticket, and entering the number of votes for each candidate in the poll book and tally sheet for that precinct, and certifying the same; that, in the performance of their duties as such election officers, they unlawfully, wilfully, falsely, fraudulently, and knowingly refused to enter in the poll book and tally sheet the number of votes cast for certain named candidates for certain offices on the republican ticket, and entered in the poll book and tally sheet for that precinct more votes for certain other named candidates for the same offices, and certified the returns so entered as being a true and correct return of all the republican votes cast at that primary election in that precinct, and that the candidates therein named received the exact number of votes placed opposite their respective names for the offices therein desig-

nated, all of which was false and fraudulent as the defendants well knew.

The defendants named in the information joined in a demurrer, on the ground, among others, "that the facts charged do not constitute a crime under the laws of the state of Washington." The demurrer was overruled. The appellant Robinson entered a plea of guilty, and moved in arrest of judgment upon the ground, that "the facts as stated in the information herein do not constitute a crime or misdemeanor." The motion was denied, and judgment was entered, sentencing appellant to five months' imprisonment and to pay a fine of \$250.

It is stipulated that the sole question to be determined is whether or not the penalties provided by Rem. & Bal. Code, § 4967, attach and apply to an election or primary meeting held under the provisions of the primary law of 1907. No other matter being discussed, we will confine our attention to that single question. Section 4967 reads as follows:

"Every person charged with the performance of any duty under the provisions of any law of this state relating to elections, who wilfully neglects or refuses to perform such duty, or who, in the performance of such duty, or in his official capacity, knowingly or fraudulently acts in contravention or violation of any of the provisions of law relating to such duty, shall, on conviction thereof, be fined in any sum not exceeding one thousand dollars, to which punishment may be added imprisonment in the county jail for a term not exceeding one year."

This section was first enacted by the territorial legislature of 1877 (Laws 1877, p. 205, § 2), as a part of the territorial criminal code, and was embodied in the code of 1881 as § 912.

The election, for malfeasance at which the appellant was convicted, was the "September primary" election held in pursuance of ch. 209, Laws of 1907, p. 457 (Rem. & Bal. Code, § 4804 *et seq.*). Section 33 of the act, as amended by § 10, of ch. 82, Laws of 1909, p. 179 (Rem. & Bal. Code, § 4837), reads:

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“The provisions of the statute in relation to the holding of elections, the solicitation of voters at the polls, the challenging of voters, the manner of conducting elections, of counting the ballots and making returns thereof, and all other kindred subjects, including the sale of intoxicating liquors during the hours the polls are open, shall apply to all primaries in so far as they are consistent with this act.”

It is contended by the respondent that this section adopts, as a part of the primary election law, § 4967 above quoted. This position is untenable. Section 33 of the primary law in terms adopts only provisions of the statute “in relation to the holding of elections.” Section 4967 is no part of that statute. It is a general criminal statute not found in any election law. It does not follow, however, that the provisions of § 4967 do not apply to violations of duty by primary election officers.

The appellant contends that a primary election, held pursuant to the act of 1907, is not such an election as the legislature had in contemplation when it passed § 4967, and that, therefore, violations of duty imposed upon election officers by the later act do not incur the penalty of that section. There would be more force in this contention if § 4967 had ever been enacted as a part of the general election laws; but such is not the case. There is, therefore, no implication, from context or connection, that it shall apply only to general elections, or to elections of officers, or to any particular kinds of elections, or to elections for any particular purpose. It was enacted, and has always been, a general criminal statute. It is couched in the most general terms. It expressly applies to every person charged with the performance of any duty under the provisions of any law of the state relating to elections. It must have been known to the legislature of 1877, when it passed this section, that the laws relating to elections would be changed, that new offices would be created, that the necessity for elections for such newly created offices would arise, that elections for different purposes than those then provided for would be authorized by

statute, and that new duties would be imposed upon election officers from time to time. Yet we find in this section no intimation that its provisions shall apply only to elections provided for, or only to duties prescribed by laws relating to elections then in force. We cannot conceive that it was the intention of that legislative body that, upon every future modification of the election laws, this section would have to be reenacted, or a similar section passed, or the election laws as modified be left without sanction. To give to this section the narrow construction contended for would have made it a dead letter long since. It was intended, as are all general criminal statutes, to be of a somewhat permanent nature. It was meant to meet a known and continuing potential condition, which would necessarily be present under any statute relating to elections, without regard to the time of its passage or the purpose of the election. It defines with certainty and exactness the offense and the conditions under which it may be committed. It is immaterial under what law relating to elections those conditions may be presented.

The cases cited by the appellant seem to us soundly distinguishable from the case here. In the English case of *Wells v. Porter*, 3 Scott 141, 5 L. J. C. P. 250, the statute under consideration was directed against the practice of jobbing in stocks. The act was construed as applying only to domestic stocks; (1) because jobbing in foreign stocks was unknown in England at the time the act was passed, and (2) because the act contained certain provisions which could apply only to domestic stocks, thus showing that such stocks alone were in the legislative mind. The distinction seems too obvious for comment.

The case of *Commonwealth v. Wells*, 110 Pa. St. 436, 1 Atl. 310, arose under certain statutes which, though penal in their nature, were parts of acts relating solely to the election of public officers, and the court held that the application of the penalty was limited by the context to elections of such officers. The court said:

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“These provisions are parts of enactments which relate to the election of public officers, and have never been understood otherwise. The act of 1817 expressly refers to betting on the success of candidates for public offices, and the penal provisions against betting on the result of elections, enacted in 1839, are embodied in an act which relates exclusively to elections for public officers. The subject respecting which betting is prohibited is unmistakable, and the word election cannot be justly construed to apply to other subjects. ‘We are to look to the words in the first instance, and when they are plain we are to decide on them. If they be doubtful, we have then to have recourse to the subject matter.’ The meaning of the words ‘any election within this commonwealth,’ when read with the context, is plain, and when considered with the subject matter there is no footing to conjure a doubt whether they may refer to the election of officers for a private corporation, or of a meeting of citizens.”

It was, therefore, held that betting upon a primary election did not incur the penalty of the statute which clearly related to and was a part of a law providing only for the election of officers.

*Commonwealth v. Howe*, 144 Mass. 144, 10 N. E. 755, also involved simply a question of construction. The court held that “balloting at a national, state, or municipal election” imported balloting in the election of national, state, and municipal officers; and that, therefore, the penalty provided in the election law for casting more than one ballot at a national, state, or municipal election applied only to balloting for such officers, and did not apply to balloting on the question of granting licenses for the sale of intoxicating liquors.

It is obvious that, in each of the cases cited, the statute under consideration was much more circumscribed in its terms than that here involved, and both by context and specific provisions was limited in its application to specific kinds of elections. No such limitation, either by context or by the terms employed, is found in our statute. It is a general criminal law not a part of any election act, and hence it is

not limited by the context to any particular election statute. It contains no words which by any intendment can be construed as limiting its penalty to violations of duty in elections of officers. The acts penalized are neglect or refusal to perform any duty or violation of any provision of law relating to such duty, incumbent "under the provisions of any law of this state relating to elections." That the primary election law of 1907 is a law of this state relating to elections is self-evident. That the officers of such primary elections are "charged with the performance" of duty is unquestionable. The case presented falls squarely within the terms of the general criminal statute.

The judgment is affirmed.

MOUNT, FULLERTON, and MORRIS, JJ., concur.

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[No. 10407. Department Two. June 25, 1912.]

JAMES TULLOCH *et al.*, Appellants, v. THE CITY OF SEATTLE  
*et al.*, Respondents.<sup>1</sup>

MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS—SUBMISSION TO VOTERS—SEPARATE PURPOSES. The submission to the electors of a bond issue for municipal purposes is not illegal as combining several distinct and unrelated objects or purposes, which must be submitted separately, where the two purposes of the bonds was to provide funds for the purchase of existing street railways, or, in the alternative, for the construction of parallel lines, in the discretion of the municipal officers; since they are but two naturally related parts of the single purpose of acquiring a municipal street railway.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 15, 1912, dismissing an action for an injunction, after a trial to the court. Affirmed.

*Thos. R. Horner*, for appellants.

*James E. Bradford* and *Howard D. Hughes*, for respondents.

*Peters & Powell*, amici curiae.

<sup>1</sup>Reported in 124 Pac. 481.



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Opinion Per MORRIS, J.

MORRIS, J.—This is an action in which it is sought to restrain the issue and sale of bonds, amounting to \$800,000, authorized by the voters at an election held in the city of Seattle March 7, 1911. The money represented by the bonds is to be used in the acquiring of a municipal street railway system. The validity of the bonds is attacked upon the ground that the proposition by which they were submitted to the vote of the people contained two separate and distinct purposes, and the election in which the bonds were carried was, for this reason, invalid. The action was dismissed in the court below, and plaintiffs have appealed.

This question has been before this court in several cases, and it has uniformly been held that several distinct, unrelated, and independent objects or purposes must be separately submitted. *McBryde v. Montesano*, 7 Wash. 357, 34 Pac. 559; *Blaine v. Seattle*, 62 Wash. 445, 114 Pac. 164; *Blaine v. Hamilton*, 64 Wash. 353, 116 Pac. 1076, 35 L. R. A. (N. S.) 577. It must, therefore, be determined whether, under the authority of those cases, the submission of this bond issue to the people was in such a form as to render it invalid.

On January 13, 1911, the city council of the city of Seattle passed an ordinance entitled:

“An ordinance declaring the advisability of a city electric railway on Rainier avenue and other streets, avenues and ways, and providing for the same, specifying and adopting the system or plan proposed, declaring the estimated cost thereof, as near as may be, and providing for the submission of such system or plan and the incurring of an indebtedness therefor, to the qualified voters of the city, for their adoption and assent thereto, or for their rejection thereof, at a special election to be held on the day of the general city election on the 7th day of March, 1911.” Ordinance No. 26,069.

Section 2 of the ordinance defines the system or plan of electric railway to be acquired by the funds to be voted. The route of this railway, the specific streets it is to occupy,

and its termini, are specifically set forth. Section 3 estimates the cost of the proposed railway at \$800,000, and the following section provides for the incurring of a general indebtedness in the sum of \$800,000, and the issuance of bonds therefor for the purchase, acquisition, or construction of the railway along the proposed line. It is further provided that:

“Wherever any portion of the routes hereinbefore designated is found to be occupied by any existing electric railway, privately owned right of way, track or tracks, any of the facilities or appurtenances used in the operation of the same, and such a right of way, tracks, facilities and appurtenances, or any of them, are in the judgment of the board of public works suitable and necessary for use as part of the electric railway system or plan hereinbefore specified and adopted, the same shall be appraised at a fair and just valuation by the board of public works.”

The ordinance then authorizes the city to purchase such existing suitable tracks if, in its judgment, the railway system can be best acquired by the purchase of such tracks. Such purchase is, however, not required, but is discretionary, the city being empowered, in case it decides not to purchase such existing lines, to construct and lay parallel tracks. These two provisions for the purchase of existing street railway lines, or in case such purchase be deemed not wise, the construction of a parallel line, are the two alleged several, distinct, and independent purposes that render the submission of the proposition to the people invalid. We do not so regard them.

The case is unlike *Blaine v. Seattle, supra*, relied upon in support of appellants' contention. In that case an election was held pursuant to an ordinance submitting to the vote of the people a proposition to issue bonds for eight several and distinct purposes aggregating \$421,000. These separate purposes were \$57,500 for sites for fire houses; \$50,000 for site for city stables; \$173,500 for the construction of fire houses; \$5,000 for a combined fire house and

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dock; \$10,000 for a police sub-station; \$25,000 for an isolation hospital; \$50,000 for a bridge on Spokane avenue; and \$50,000 for a bridge on Westlake avenue. These eight distinct propositions were submitted as one in such a manner that the voter was compelled to vote for or against all of them, and it was held that the propositions contained nothing in common, nor were they so related as to lead any voter to either favor or disfavor all eight measures. For this reason, the voter had no liberty of choice as between the measure he favored and the one he disproved of; in order to obtain the one, he must vote for the other. There was, therefore, no way of determining the individual choice of the voter, and the scheme was held contrary to the letter and spirit of our election laws.

No such scheme confronts us in this case. Here we have but one object to be attained by the proposition submitted to the voter upon which he is to express his assent or dissent, and that object is municipal ownership of street railways. It is true the proposition provides for the exercise of a discretion on the part of the public officials as to whether, in cases where the route determined upon is along and upon streets where privately owned and operated street railway systems now exist, it will be better to acquire such existing system by purchase or to lay parallel tracks. This provision does not, however, destroy the unity of the proposition submitted to the voter—shall the city operate a street railway system along a designated route, and for such purpose issue its bonds for the sum of \$800,000? Having determined that it shall do so, and for that purpose may expend this sum of money, the unity of the proposition is not disturbed by vesting in the municipal officers the discretion in given cases to acquire existing lines by purchase or to construct parallel lines, as the best interest of the city may advise. As is said in *Blaine v. Hamilton, supra*, the test, where this vice of submitting several purposes as one is suggested, is, "Are the several parts of the project so related that united they

form in fact but one rounded whole?" It would be difficult to determine that the acquirement of a part by purchase of existing railway lines, and the original construction of another part, were not so related as to form in fact but one rounded, whole, and that, municipal ownership of street railway lines.

The object of the rule preventing the submission of several and distinct propositions to the people united as one in such a manner as to compel the voter to accept or reject all, is to prevent the joining of one local subject to others in such a way that each shall gather votes for all, and thus one measure, by its popularity or its apparent necessity, carry other measures not so popular or necessary and which the people, if granted the opportunity of separate ballot, might defeat. The only measure here upon which the voter is called upon to express an opinion is his belief, or lack of it, in municipal ownership of street railways. No other measure is submitted to him which he is compelled to assent to against his better judgment in order to express his approval of municipal ownership. For this reason, the authorities relied upon by appellant do not appeal to us as being in point. There is certainly no connection between this proposition as submitted to the people, and the propositions condemned as separate and distinct in *McBryde v. Montesano*, and *Blaine v. Seattle*.

In *Clark v. Los Angeles*, 160 Cal. 30, 116 Pac. 722, the proposition submitted included the construction of general electric works and the acquiring of lands, water rights, rights of way, and other property to be used in connection therewith. It was attacked, as here, upon the ground that it included two separate and distinct objects. This was denied by the court, holding,

"This states but a single object and purpose, namely, the establishment of the municipal improvement described. In order to accomplish this purpose and secure this object, many things were, of course, necessary to be done, and they

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are also stated in general terms in the question. But by the question stated, the money obtained from the proposed bonds is not to be used for any of the physical objects mentioned in the more detailed description, unless they are necessary for the principal purpose and object; that is, the works for supplying the city and its inhabitants with electricity. The words 'acquiring and constructing' do not express the dual purpose of acquiring one improvement of this kind and constructing another with the money obtained. They indicate the single purpose of acquiring all the property that may be found necessary for the proposed works, even including water rights and constructing works with said property."

So here, in order to obtain municipal ownership as desired by the voter, it might be necessary to purchase a part of the system from the private ownership of existing lines; it might be necessary, where such purchase was not advisable, to construct or lay a parallel line. But there is but one object to be obtained by the expenditure of the money, and that is, a municipally owned and operated street railway system. The same reasoning is employed by the same court in a like case, *Clark v. Los Angeles*, 160 Cal. 317, 116 Pac. 966.

In *Nash v. Council Bluffs*, 174 Fed. 182, the electors were called upon to give their assent to or dissent from the issuance of bonds to purchase or build a system of waterworks. It was contended that the bonds were invalid because of the dual purpose "to purchase or build." The court held otherwise, saying, as might well be said here, but one question was submitted to the people: "It was a question of municipal or private ownership. That was in fact the question, and municipal ownership won out." In *Sioux Falls v. Farmers Loan & Trust Co.*, 136 Fed. 721, the question submitted was the issuance of bonds for the purpose of constructing or purchasing a system of waterworks, and it was claimed the bonds were invalid because of the submission of two separate and distinct propositions. The court ruled otherwise. In *Hubbard v. Woodsum*, 87 Me. 88, 32 Atl. 802, the proposition called for the expenditure of \$30,000, to

construct new county buildings, and further authorized the county to borrow money for the purpose of construction. Held, not objectionable as covering more than one subject. The opinion reads in part: "The most that can be claimed in that respect is that there are two parts in the proposition, such two parts being but one whole." So it might be said as to the case at bar. The proposition contains two parts, but they are parts of one harmonious whole, and that is a municipal street railway system. A like rule is laid down in *State ex rel. Canton v. Allen*, 178 Mo. 555, 77 S. W. 868, where the submission to the vote of the people included a proposition to issue bonds for the purpose of constructing an electric light plant, and another to increase the municipal indebtedness by issuing bonds for the purchase of an electric plant then in existence. In response to the contention that the propositions as submitted invalidated the bonds because of their double nature, it was held the two propositions were so related that they could be united and submitted as one. The same end was intended to be accomplished, but in two different ways to be determined upon by the municipal authorities in the exercise of their discretion.

*State ex rel. Columbia v. Allen*, 183 Mo. 283, 82 S. W. 103, affords another illustration of the application of the same rule to the same contention. There the proposition was, one sum for the purchase of waterworks and an electric light plant of an existing privately owned plant, and the other another sum for the construction of a waterworks and electric light plant. *Kemp v. Hazelhurst*, 80 Miss. 443, 31 South. 908, and *Coleman v. Eutaw*, 157 Ala. 327, 47 South. 703, are like cases. In the latter case it is said:

"But where the purpose evolved in the blending is the product of two of the purposes enumerated in the act for which bonds may be issued, and they might naturally and reasonably be deemed or made a part of one of a more general scheme, we are of the opinion that the act does not inhibit the exercise by the governing body of a discretion to blend

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into one proposition for submission to the voters such enumerated purposes."

In *Truelsen v. Duluth*, 61 Minn. 48, 68 N. W. 714, the court expressed its opinion that bonds for the erection or purchase of a water and light plant might be submitted together as one proposition, but held the method there employed illegal because of the antagonistic manner of the submission. It must be conceded that cases may be found, such as *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400; *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, and *Elyria Gas & W. Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335, from which might be deduced a rule supporting appellant's contention; but those cases, as applied to purposes naturally related, are not in harmony with our holding in *Blaine v. Hamilton*, and for that reason cannot be regarded as authoritative here. Their reasoning is more in accord with a state of facts similar to those submitted in *Blaine v. Seattle*, where the propositions as submitted are unrelated and have no natural connection one with the other, and for that reason they are there cited as supporting the holding.

All of the cases dealing with this question of related or unrelated purposes or objects are more or less influenced by the special provisions of constitutions, statutes, and ordinances, but running through them all may be found two easily distinguished principles. Separate, distinct, and independent purposes or objects may not be joined in one proposition for submission to the voter. United, related and dependent objects, that together form one general scheme or plan, may be united and submitted as one. No better illustrations of the application of these two principles may be found than in *Blaine v. Seattle* falling within the first rule, and *Blaine v. Hamilton* falling within the second rule. The case at bar belongs to the second class, and adopting the reasoning employed in cases of that character, we hold there is no legal objection to the method employed in submitting this question of municipal ownership of street railways to

the people, as definitely outlined in the ordinance and proposition whereby it was called to their attention; and their judgment, whether wise or unwise, good or bad, must be upheld.

The judgment is affirmed.

FULLERTON, MOUNT, and ELLIS, JJ., concur.

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[No. 10268. Department Two. June 25, 1912.]

J. J. McKAY, *Respondent*, v. NORTHERN BANK & TRUST  
COMPANY, *Appellant*.<sup>1</sup>

FRAUDS, STATUTE OF—DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION. There is an original undertaking on sufficient consideration, and not a promise to answer for the debt of another, within the statute of frauds, where the principal creditor of a contractor was interested in seeing him complete a grading contract, the proceeds of which had been assigned to it, and upon a threatened foreclosure of a chattel mortgage upon the contractor's outfit, promised the mortgagee to pay any balance due, if the mortgagee would forego foreclosure until the contract was completed.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 12, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

*F. J. Carver and John Slattery*, for appellant.

*Skeel & Whitney*, for respondent.

MORRIS, J.—Respondent was the owner of a grading outfit, consisting of horses, harness, dump wagons, and other property, which he sold to Wightman & Bradbury, a partnership engaged in that business. Upon this sale there was due respondent \$425, evidenced by promissory notes, secured by a chattel mortgage on the property. Wightman & Bradbury were also indebted to the appellant upon the pur-

<sup>1</sup>Reported in 124 Pac. 372.



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chase from it of horses and other property used in the grading business. To secure the appellant upon this indebtedness, an assignment was made to it of a contract for grading West McGraw street, Seattle, which Wightman & Bradbury had obtained under assignment from N. McKinnon, the original contractor. When the first note became due, McKay demanded its payment, which Wightman & Bradbury were unable to make, contending that all the money coming to them under their contract was claimed and taken by the bank under its assignment. McKay then informed Wightman & Bradbury that he would declare a default under his chattel mortgage, and retake the property. In order to avoid this, an arrangement was made whereby the bank satisfied McKay it would protect him against any loss if he would permit the property to remain with Wightman & Bradbury until they had finished their contract. Just what this arrangement was is the issue in the case; respondent alleging, and being sustained by the trial court in its findings, that the bank agreed with McKay that it would pay him the balance due him upon his notes and mortgage, out of the money it received under its assignment of the Wightman & Bradbury contract, and that McKay was to surrender the notes and mortgage to the bank, permit the property to remain in the possession of Wightman & Bradbury, and look only to the bank as his debtor. Relying upon this promise of the bank, the court finds that McKay fully complied with all the demands of the bank, surrendered his notes and mortgage to it, and subsequently, at the request of the bank, gave it a bill of sale of the property. The bank having failed to pay McKay, he brought this action to recover the balance due him, and being successful below, the bank appeals from the judgment, claiming the evidence is insufficient to justify the findings, both in fact and law; that, assuming the promise to pay was as alleged by McKay, it was a promise to answer for the debt of another and void.

There is no need to discuss the statute of frauds as applied

to promises to pay the debt of another. It is well settled, as said in *Wells & Morris v. Brown*, 67 Wash. 351, 121 Pac. 828, that, when the promisor, for a valuable consideration, assumes to pay a debt contracted by another, he may by his language assume an original and not a collateral undertaking, and thus make the debt his own. There could be no question but that the officials of the bank, if the court accepts respondent's evidence, fully complied with all demands of the law in assuming an original undertaking and making the bank alone answerable to McKay as its own debt. The evidence upon this point is not harmonious, but there is sufficient to sustain the findings of the court, and under the rule in such cases, the findings will not be disturbed. There could be no question of the sufficiency of the consideration to the bank for making such a binding promise. It was the main creditor of Wightman & Bradbury, and depended upon the successful termination of the grading contract to obtain its money under its assignment. It was, therefore, to its interest and great advantage to have Wightman & Bradbury retain the possession and control of the outfit purchased from McKay to assist in completing this work. In promoting this arrangement, the bank was promoting and furthering its own interest, and a promise to pay McKay's debt made on such a consideration would be a valid and binding obligation.

There is nothing more to be said. A review of the evidence would serve no useful purpose. The judgment being founded upon sufficient evidence, is sustained and affirmed.

ELLIS, MOUNT, and FULLERTON, JJ., concur.

[No. 10305. Department Two. June 25, 1912.]

THE STATE OF WASHINGTON, *on the Relation of School  
District No. 56, Chelan County, Plaintiff*, v. THE  
SUPERIOR COURT FOR CHELAN COUNTY *et al.*,  
*Respondents.*<sup>1</sup>

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL ELECTIONS—VOTE—STATUTES. Rem. & Bal. Code, § 4664, providing that a school election for the purchase of school grounds shall be by ballot, is directory only, and the election is not invalidated by the fact that a standing vote was taken, in the absence of evidence that the election did not fairly represent the will of the electors.

STATUTES—TITLE AND SUBJECTS—SCHOOLS. The provision of the code of public instruction relating to the acquisition of school sites is germane to and within the title "an act providing for the maintenance of and relating to a general and uniform school system" of the state etc., where the act itself was very general and covered all manner of subjects relating to the public schools.

EMINENT DOMAIN—COMPENSATION — STATUTES—CONSTRUCTION—SCHOOL HOUSE SITES. Rem. & Bal. Code, § 913, providing that, upon the condemnation of a school site, the compensation to be paid the owner shall be the fair and full value of the premises does not limit the recovery to the naked value of the land, in violation of the constitution requiring payment of the value of the land taken and for any depreciation to the land not taken; since the statute is directory and contains no words of limitation confining the jury to the value of the land taken alone.

SAME—PUBLIC USE—SCHOOL PLAY GROUNDS. The condemnation of land adjacent to a school house site, which the physical development of the school children required as a suitable place for recreation and exercise, is for a public use and within the provision of the public schools.

Certiorari to review a judgment of the superior court for Chelan county, Grimshaw, J., entered November 18, 1911, dismissing a condemnation proceeding, after a hearing on the merits before the court. Reversed.

<sup>1</sup>Reported in 124 Pac. 484.

*Williams & Corbin*, for relator.

*James B. Murphy* and *Bogle, Graves, Merritt & Bogle*, for respondents.

FULLERTON, J.—In this proceeding School District No. 56, Chelan county, seeks to appropriate, as additional grounds to its existing school site, two and twenty-seven one hundredths acres of land out of a tract containing 18 acres, now the property of the respondents J. N. Dotson and Jennie N. Dotson. The records show that the school district named comprises the town of Cashmere, in Chelan county, together with certain outlying territory; that it now owns a school site consisting of two acres, situated in the town of Cashmere on which it has erected two school buildings, one 70 by 75 feet in size, and another 50 by 102, which buildings, it is conceded, are ample to accommodate the present attendance at the school and the anticipated increase in attendance for sometime in the future. The additional grounds sought to be acquired abut upon the existing site and form therewith a single tract or parcel of land.

The testimony of the school officers was to the effect that the present grounds were adequate for the purposes of the school, in the sense that they afforded sufficient room for ingress and egress to and from the school buildings and sufficient room for the necessary auxiliary and out-buildings, but that they were inadequate in the sense that they afforded no room for the pupils attending the school to exercise; the superintendent of the school testifying that it had been found almost impossible, without forbidding all forms of play and exercise, to keep the pupils from trespassing on the adjoining property, and that much complaint had been made to him by adjoining property holders of such trespassing; that the additional ground sought was desired at the present time to afford additional play-grounds for the pupils of the school, that they might have grounds upon which the com-

mon athletic games current among schools of its class could be played.

The preliminary proceedings for the acquisition of the lands had by the school board seem to have been in compliance with the statutes, save in one particular. At the special meeting of the voters of the district, called to determine whether the board of directors should be authorized to acquire the additional tract for school purposes, the vote was taken by calling on the voters present to stand up and be counted, instead of by ballot as the statute directs. On the hearing in the court below, at the conclusion of the petitioner's case, the respondents moved for a dismissal of the proceedings on the grounds, first, that the petitioner had not shown a compliance with the law with reference to the selection of the land sought to be taken; second, that the act under which the petitioner is proceeding is invalid and void; and third, that it is seeking to take the land for a purpose not authorized by law. The motion was granted, and the petitioner brought the proceeding to this court by a writ of review.

The contentions of the respondents are the same in this court as they were in the court below, and we shall notice them in the order in which they are stated in the motion. By the code of public instruction it is provided (Laws 1909, p. 349; Rem. & Bal. Code, § 4664), that any board of directors may, at its discretion, call a special meeting of the voters of the district to determine whether the district shall purchase any school house site or sites or additional grounds to an existing site, at all of which such meetings the "voting shall be by ballot, the ballots to be of white paper of uniform size and quality." As we have elsewhere stated, the voting at the special meeting in which it was determined to purchase the school site in question here was not by ballot, but by standing vote, and it is this fact that is thought to render the preliminary proceedings void. But we cannot give it this effect. We think the statute directory, instead of manda-

tory. The sentence which we have quoted is all that the statute contains with reference to the manner of voting. It will be noticed that there is no requirement that polls shall be opened, that ballot boxes shall be prepared or judges appointed to receive and count the ballots; that it does not provide what the ballots shall contain nor require secrecy with reference to the ballots or manner of voting; in fact, none of the requirements usually accompanying a formal election are made essential; and furthermore there is no provision of the statute, either direct or implied, declaring the election void if the requirements of the statute are not followed in detail. In such cases, it is usual to hold the provisions directory rather than mandatory, and allow the election to stand unless it appears that the election does not fairly represent the will of the electors. *Williams v. Shoudy*, 12 Wash. 362, 41 Pac. 169; *Richards v. Klickitat County*, 13 Wash. 509, 43 Pac. 647; 15 Cyc. 316, 318. There is here no contention that the election complained of did not express the popular will of the electors, and we hold it valid.

In their argument upon the second objection, counsel question the validity of the chapter relating to eminent domain found in the code of public instruction, contending that the particular chapter is not germane to the title of the act known as the code of public instruction. The title of the act is as follows:

"An Act establishing, providing for the maintenance of, and relating to, a general and uniform public school system for the state of Washington, providing penalties for the violation of the provisions of the act, and repealing all acts and parts of acts in conflict with the provisions of this act." Laws 1909, p. 230.

The body of the act is what the title evidences, namely, a complete code for the government and maintenance of the public schools of the state. In the act are found provisions relating to the superintendent of public instruction, the higher institutions of learning, the state school for the deaf and blind, the state institution for the feeble minded as well

as provisions relating to the common school system. It contains provisions for the formation, alteration and consolidation of school districts, it provides for the government of the several schools, the officers thereof and prescribes their duties. It contains provisions relating to the county boards of education, to county institutes, to compulsory vaccination, to text-books for use in the public schools, to the school revenues, and to the distribution of the public school funds. It provides for the erection of school buildings and to the acquisition of land for that purpose, the chapter on eminent domain being a part of the general scheme provided for the acquisition of such land. The act of course contains many provisions other than those enumerated, but enough is indicated to show that, if this special provision is not within the title of the act, there is much else contained in it also that is not germane thereto. Indeed, it would be difficult to find in any of the provisions of the act one more pertinent or germane to the title than the one here thought objectionable. Before a public school can be even established, land on which to erect a school building must be acquired, and one examining an act relating to the general and uniform public school system would naturally expect to find therein provisions relating to the acquisition of land on which to erect school buildings.

In *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214, we held that the provision of the act relating to compulsory vaccination is within and germane to the title of the act. This case is in point on the question here, as certainly a provision relating to the acquisition of a school house site cannot be less germane to the title in question than is a provision making compulsory vaccination a condition precedent to the right to attend the public schools. We think, therefore, that the provision objected to is germane to and within the title of the act.

But perhaps the respondents' principal objection is that

the act in itself, conceding it to be constitutional with respect to its title, does not comply with the constitutional mandate with reference to the compensation to be made for the taking of private property. The act, after granting to the several school districts the right to exercise the power to condemn for a school house site and additional grounds to an existing site, outlines a procedure in the courts for the exercise of the right. After providing for the institution of the proceedings by petition, the judgment of necessity for the taking, and the calling of a jury to ascertain the amount of compensation to be paid for the taking, and the manner of trying the issue, continues as follows:

"Sec. 8. Upon the close of the evidence, and the argument of counsel, the court shall instruct the jury as to the matters submitted to them, and the law pertaining thereto, whereupon the jury shall retire and deliberate and determine upon the amount of compensation in money that shall be paid to the owner or owners of the real estate sought to be taken for such school house site purposes therefor, which shall be the amount found by the jury to be the fair and full value of such premises; and when the jury shall have determined upon their verdict, they shall return the same to the court as in other civil actions." Laws 1909, p. 374, § 8; Rem. & Bal. Code, § 913.

The claim of invalidity of the law is founded upon the clause providing that the compensation to be paid the owner of the property taken "shall be . . . the fair and full value of such premises." This, it is said, limits the amount of the recovery to the naked value of the land taken, whereas by the constitution the owner of land taken for a public use is entitled not only to the fair and full value of the land taken, but for any and all depreciation the taking of such land may cause to the land not taken of which the land taken may have formed a part. Unquestionably this contention is correct as to the measure of the recovery. This court has so held in a long line of cases. *Enoch v. Spokane Falls, etc. R. Co.*, 6 Wash. 393, 33 Pac. 966; *Seattle & Montana R. Co. v. Roeder*, 30 Wash. 244, 70 Pac. 498, 94 Am. St. 864;



*Sultan Water and Power Co. v. Weyerhauser Timber Co.*, 31 Wash. 558, 72 Pac. 114; *State ex rel. Biddle v. Superior Court*, 44 Wash. 108, 87 Pac. 40; *Olympia Light and Power Co. v. Harris*, 58 Wash. 410, 108 Pac. 940.

But we cannot agree with the contention that the legislature has sought to limit the recovery alone to the value of the land taken. It will be noticed that, while the act provides that the verdict of the jury shall be the fair and full value of the land taken, there are no words of limitation confining the verdict solely to that amount; hence, if we concede that an attempt of the legislature to confine the recovery to elements of damage less than the constitutional requirements would avoid the act, this act is not necessarily void. But we prefer to think clauses of this character directory rather than mandatory, and that the owner of property when taken for public use is entitled to recover all such damages as he directly suffers by the taking. This would include not only the fair market value of the land taken, but the amount of depreciation, if any, in land not taken of which the land taken formed a part, or in connection with which its use is necessary or convenient. The power to condemn is the principal thing, and when this is granted, the provisions relating to its exercise need not be prescribed to the utmost detail. It is the evident purpose of this act to leave the protection of the rights of the landowner to the justice of the superior court, since it is specially required that the court shall instruct the jury as to the matters submitted to them and the law pertaining thereto. See Rem. & Bal. Code, § 913, above quoted.

Finally, it is urged that the use for which the land is sought to be taken is not a public use. It is contended that the land is sought rather as a play-ground for the pupils attending the school than for strictly school purposes. The testimony of the superintendent of the school, from which we have hereinbefore cited, undoubtedly lends color to this contention; but nevertheless we think the use for which the

land is sought to be taken is a public use. The physical development of a child is as essential to his well being as is his mental development, and physical development cannot be had without suitable places for recreation and exercise. To acquire such grounds is, therefore, within the province of the public schools.

The order of dismissal entered by the superior court is reversed, and the cause reinstated with instructions to proceed with the hearing thereof in accordance with the statutes.

MOUNT, ELLIS, and MORRIS, JJ., concur.

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[No. 10265. Department Two. June 25, 1912.]

CARL E. HARKINS, *Respondent*, v. VENESS LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISKS. An operator of a saw assumes the risk of dangers from the fact that no adequate means had been provided for stopping the saw when slivers should become lodged in it, as the defect was open and obvious; and also of the dangers incident to sawing cants cut from top logs, by reason of the greater prevalence of splinters in top logs, he having had notice of such fact without special warning thereof.

SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Upon a dispute in the evidence as to whether a special warning should have been given to a sawyer of the danger from attempting to remove wedged splinters with his hands, the question of his contributory negligence in so doing is for the jury.

SAME—CHOICE OF METHODS. In such a case, he is not guilty of contributory negligence in not adopting the safe way by having the mill shut down, when no method had been provided for his stopping the mill without leaving his post, and it is doubtful if that method of removing slivers was contemplated.

SAME—UNSAFE METHODS OF WORK—KNOWLEDGE. A sawyer is not chargeable with knowledge that the removal of wedged splinters with the hands is unsafe merely because he may know of other safe ways of doing it.

<sup>1</sup>Reported in 124 Pac. 492.

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Opinion Per FULLERTON, J.

TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS. A requested instruction assuming facts as proven which were for the jury is properly refused.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 15, 1912, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a sawyer in a mill. Affirmed.

*Ballinger, Battle, Hulbert & Shorts* (Wm. J. Claassen, of counsel), for appellant.

*W. W. Langhorne* and *Hayden & Langhorne*, for respondent.

FULLERTON, J.—The appellant owns and operates a lumber mill, and the respondent was one of its employees, working as sawyer on the pony saw therein. The respondent was injured while engaged in the performance of his duties, and brought this action to recover therefor. He prevailed in the court below, and this appeal is from the judgment entered in his favor.

The evidence as to the cause of the accident and the manner in which it occurred is not in dispute. The pony saw on which the respondent was injured was used to cut into dimension lumber the cant timbers that were cut from logs by the main saw. On the day in question, a cant cut from a log called in the record a "top log," was shunted down for sawing from the main saw to the pony saw. Top logs have a particular significance to mill men. They are so called from the fact that they are cut from the tops of the trees from which they are taken, and are apt to be in a more or less shattered condition owing to the force with which they strike the ground when the trees are felled. This shattered condition renders them liable to give off splinters or slivers while being sawed, which catch in the teeth of the saw and are thrown off with more or less force, or are caught in the frame of the saw in such a manner as to rub the saw, causing it to heat from the friction thus produced. When

the respondent attempted to saw the cant in question, a sliver broke therefrom and became wedged between the saw and the saw guide. The appellant first sought to remove it by punching it out with a stick which was kept near the sawyer's position for that purpose; but being unable so to do, he procured a monkey wrench, which was also immediately at his hand, and loosened the tension of the guide, thinking the saw would force the sliver through; but finding that it did not, he reached over and took hold of it with his hand and attempted to pull it out. As he did so, the teeth of the saw caught the sliver, and jerked it through the guide with such suddenness and force that it brought his hand in contact with the saw, causing the injury of which he complains.

The respondent testified that, while he had worked in the appellant's sawmill off and on for a number of years, his actual experience as a sawyer did not extend over three months; that he had worked as a ratchet-setter at various times for short intervals for a year past, and during that time had observed the sawyer in the performance of his duties and thus acquired what knowledge he had of the workings of the pony saw; that no one had ever instructed him as to the proper method of removing a sliver that had caught in the guide, and that he first used a stick upon it, and then loosed the guide and attempted to pull the sliver out with his hands because he had seen other sawyers remove slivers in that way, and that he did not know there was any particular danger in so doing. He testified, also, that when he discovered that he could not remove the sliver with the stick, he sought to signal the head sawyer to shut down the mill, but was unable to attract his attention; testifying further, and in this he is corroborated by experienced sawyers, that when a sliver gets caught in such a way as to rub the saw and cause it to heat, the saw becomes dangerous, as the heat loosens the shanks which hold the teeth, thus letting them fly out, and causes the saw to become limber, increasing its tendency to bend and break into pieces.

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It was shown that no provision had been made by which the pony sawyer could signal from his post of duty for shutting down the mill. The signal cord was near the position of the sawyer of the main saw, some forty or fifty feet from the pony saw, and on the other side of a series of live rolls. It could be reached by the pony sawyer either by crossing over the rolls, or by going around them, a considerable distance further. The foreman of the mill testified that no warning had been given the defendant of the danger of attempting to remove a sliver caught in the guide of the saw by the hand; testifying further in the same connection that such an act was extremely dangerous, and that he had no idea the respondent would attempt it, as he regarded the respondent, owing to his long service around the mill, as an experienced man, having knowledge of all the dangers connected with the operation of the saw. At the conclusion of the case, the appellant challenged the sufficiency of the evidence to sustain a verdict for the respondent, and the ruling of the court denying the challenge constitutes the first error assigned. It is contended that no negligence on the part of the appellant was shown which contributed to the respondent's injury, but that, on the contrary it clearly appears that the injury was the result of negligence and want of care on the respondent's own part. This contention we shall notice first.

In his complaint, as grounds of negligence, the appellant alleged, first, that the respondent had not furnished him with a safe place within which to work; second, that it had failed to warn him of the extra dangers and hazards assumed by a sawyer in sawing top logs; and third, that it had failed to instruct him as to the proper method of removing slivers caught between the saw and the saw guide, and had failed to warn him of the danger of attempting to remove them by taking hold of them with the hand. The claim that the place of work was unsafe is founded on the fact that no adequate means had been provided for stopping

the pony saw when slivers or splinters should become wedged between the saw and the frame in which it was operated; but this defect, if it was a defect at all, was open and obvious to the respondent when he began work upon the saw, and the rule is that he assumes, as a part of his contract of hire, the risk of injury from defects in his place of work which are open and obvious to him, or which can be discovered by the exercise of reasonable care on his part. So with the dangers incident to sawing cants cut from top logs; while there is no evidence that the respondent had been especially warned with reference thereto, we think his own evidence justifies the conclusion that he had knowledge of such dangers, acquired by observing the action of the saw when other sawyers were sawing such cants.

But with reference to the third ground of negligence, there was a direct conflict in the evidence. The respondent testifies positively that when he was put to work on the saw no instruction was given him as to the proper manner of removing slivers caught between the saw and the saw guide, and that no warning was given him of the dangers incident to removing them in the manner in which he attempted to remove the sliver at the time he was injured, and that he was not aware of the dangers; testifying when being questioned directly in reference thereto on cross-examination:

"Q. You knew that while that saw remained in motion, that while that sliver remained caught between the saw and the guide that there was danger from the saw to the attendants around there? A. Yes, sir. Q. You recognized the fact that that sliver had to be removed? A. Yes, sir, I did. Q. Did you realize that in attempting to remove a sliver of that nature that you was in danger of being injured? A. No, sir. Q. Did you not know, Mr. Harkins, from your experience from the time you have been there, that that was an unsafe method to go about releasing that sliver? A. No, sir. Q. You mean to state here to these gentlemen that you did not think that that was a dangerous thing to do? A. I had learned to do it that way, by seeing others do it and I never saw a man get hurt. Q. Do you

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not, notwithstanding that fact, know that to release it in that way was a dangerous proceeding? A. No, sir, if I had I would not have done so. Q. Why did you think it wasn't? A. I thought the sliver was loose and I could take it out."

On the other hand, the appellant, while conceding that no such warning was given, sought to show that no special warning was necessary, owing to the respondent's long service in the mill and the knowledge he must have acquired by experience and observation during such time concerning the dangers to be encountered. Clearly there was here a conflict in the evidence whether or not the appellant was negligent in this regard, and this being so, the question was one for the jury, and their finding thereon is conclusive in this court.

But it is said that the evidence shows conclusively that the respondent was guilty of contributory negligence; that he attempted to remove the sliver with his hand while the saw was in motion when there was a safe method of removing the sliver, known to him, which he failed to adopt; thus having a choice of ways of doing a thing, one of which was safe and the other dangerous, he chose the dangerous way. The safe way to remove the sliver thought to have been open to the respondent was to cause the mill to be shut down and thus stop the saw, and remove the sliver while the saw was idle. But it can be doubted whether this method of removing slivers from the saw was contemplated by the respondent's employer. There was no preparation made for him to stop the mill. It was of course possible for the respondent by a number of ways to cause the mill to be shut down. He could signal the head sawyer and ask him to signal for the stopping of the mill; he could have gone to the bell cord himself by passing over the live rolls, or by passing around the head saw; and perhaps he could have signalled other employees and asked them to perform the service. But the best evidence that this was not contemplated is the fact

that no bell cord was put in reach of the pony sawyer himself. This could have been done at but a trifling expense; and it would seem that, had it been intended that the pony sawyer should stop the mill every time a sliver caught between the saw and the saw frame, some adequate and handy means of giving the signal to stop would have been put within his reach. There was, therefore, room for two opinions upon the question whether or not the respondent was guilty of contributory negligence in this respect, and this being so, the question was for the jury and not the court.

Exceptions were taken to a number of the instructions, some of which were given by the court at the request of the respondent and some upon the court's own motion. These exceptions, as we understand the respondent's argument, do not go to any inherent defect or error in the instructions themselves, but rather to their applicability under the evidence. But we do not find them faulty in this respect. There was evidence upon all the questions to which the instructions related, sufficient, we think, in each instance to warrant the court in submitting the question to the jury. As the instructions could be error only on a contrary view of the evidence, we hold that they were properly given.

The appellant requested the following instructions, each of which were refused by the court:

"The plaintiff is chargeable with the knowledge of the danger of removing 'slivers' from the saw with his hand, provided you find that he knew there were two other methods of removing such 'slivers' which were safe.

"By virtue of the duration and nature of plaintiff's employment in the defendant's mill in the various occupations in which he was from time to time engaged therein, you are instructed to find that he had knowledge that there were three different ways to remove slivers from the saw, two of which were safe, the other being dangerous, or if you find that he did not know that one was dangerous, and he preferred to use a method, which either he knew nothing about or which he knew to be dangerous, and so was injured, you are instructed that in either event he was guilty of con-



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tributory negligence and your verdict should be in favor of the defendant."

These requested instructions were properly refused, because incorrect statements of the law. The first, because an employee is not chargeable with knowledge that a particular way of performing a duty pertaining to his employment is unsafe merely because he may know of two other ways of performing the duty which are safe.

The second is erroneous because it assumes facts as proven which were properly for the determination of the jury. Whether the defendant had knowledge that there were three different ways of removing the sliver, only two of which were safe, was in this case a disputed question of fact, and it would be error as of course for the court to assume that the respondent had knowledge that one of the ways was dangerous. Nor was there evidence that the respondent knew nothing about the way he adopted to remove the sliver. On the contrary, he testified that the way adopted was the one pursued by other sawyers from whom he learned the art of sawing, and he had no reason to believe that it possessed any peculiar dangers.

There was no error in the record, and the judgment will stand affirmed.

MOUNT, ELLIS, and MORRIS, JJ., concur.

[No. 10067. Department One. June 25, 1912.]

GEORGE F. HAMMOND, *Appellant*, v. OTTO MAU,  
*Respondent*.<sup>1</sup>

**APPEAL—REVIEW—HARMLESS ERROR.** A decision, based upon an erroneous ground, will be sustained if correct upon any ground.

**BROKERS—CONTRACT—TERMINATION—SALE BY OWNER.** Where a broker's contract does not give him the exclusive right to sell the property, the owner is not liable for the commissions if he procures a sale himself without the agency of the broker; and it is immaterial that the broker's contract fixed a time limit within which the broker might make a sale.

Appeal from a judgment of the superior court for Pacific county, Smith, J., entered September 15, 1911, dismissing an action on contract, on sustaining an objection to the introduction of any evidence. Affirmed.

*Welsh & Welsh* and *F. D. Couden*, for appellant.

*Edward H. Wright*, for respondent.

CHADWICK, J.—This action was begun by plaintiff to recover the sum of \$1,500, alleged to be due as commissions or compensation for the breach of a contract to sell real estate. On August 1, 1910, defendant wrote the plaintiff as follows:

"George F. Hammond, Portland, Oregon.

"Dear Sir: I have about 550 lots 50x100, situated at the north end of Long Beach, Washington, about one-half mile north of Ocean Park, and about one-half mile south of the I. R. N. R. R. depot at Nahcotta, Wn. If you will sell these lots within the next ninety days at ten dollars a lot or five thousand dollars spot cash for the 550 lots, I hereby agree to pay you as a commission one thousand five hundred dollars. No commission to be paid until deed is signed and money paid in full for above property."

The complaint sets out the contract, and it is further alleged that, by the terms of the contract, plaintiff was given

<sup>1</sup>Reported in 124 Pac. 377.

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an exclusive right to conduct negotiations for the sale of the real property described for a period of ninety days. He further alleges that, within the time limited, he found a purchaser who was ready, able, and willing to comply with all the conditions of the purchase; that he thereupon informed defendant that he had found a purchaser for the property, and requested defendant to prepare and tender a deed; that defendant failed and refused to comply with or carry out the terms of the contract. Plaintiff further alleges that defendant did, wrongfully and without the knowledge or consent of the plaintiff and in violation of his agreement, sell on his own account a part of the lots described in the writing, and has since repeatedly violated the terms of his contract.

When the case was called for trial, objection was made to the introduction of any evidence, for the reason that the complaint did not state facts sufficient to constitute a cause of action. This objection was sustained, and plaintiff having refused to amend, a judgment of dismissal was entered. The grounds upon which the court sustained the motion seem to have been that the communication above set forth was in the nature of an offer merely; that the complaint did not sufficiently set forth an acceptance, and that the contract, if treated as such, was not sufficiently definite as to the description of the property to satisfy the statute of frauds. Rem. & Bal. Code, § 5289. The case is brought here upon plaintiff's appeal, and is argued upon the same lines as in the court below.

We have grave doubt as to the correctness of the grounds upon which the rulings of the trial judge were made to rest, but it does not follow that a reversal should be ordered. It has been the rule of this court that we will not look to the reasons for the judgment in cases of this character, but will consider the question an open one on appeal, and if the judgment can be put upon any sound foundation, it will be sustained. *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837.

Waiving, then, the reasons assigned below, we are satisfied that the complaint does not state facts sufficient to constitute a cause of action. Treating the letter as a contract, and assuming that the complaint alleges acceptance, it is not exclusive, nor is there any statement contained therein that will warrant the inference that it is so. The governing rule is:

"The fact that a person has employed a broker to negotiate a sale does not, in the absence of a specific contract, deprive him of the right himself to negotiate, and if he procures a sale without any agency of the broker, he is not liable to the latter for a commission." 4 Am. & Eng. Ency. Law (2d ed.), 979.

We think the complaint in this case does not stand this test. If a contract is silent as to the character of the agency, the owner is entitled to sell without making himself liable for the payment of commissions, and many cases go so far as to hold that, if the contract provide that the broker shall have an exclusive right to sell, but does not in terms inhibit the principal from selling, the contract is not violated if the principal sell to one who is not a customer of the broker. It is only where an exclusive agency is granted upon sufficient consideration, or it is plainly the intent of the parties that the agency shall be exclusive, that the principal is liable when he makes the sale on his own account. *Hunter v. Wenatchee Land Co.*, 50 Wash. 438, 97 Pac. 494. Text and sustaining authority may be found in Walker, Law of Real Estate Agency, § 13; Cross, Real Estate Brokers, pp. 100, 101, 251, 252, and 5 Cyc. 1517.

Appellant makes the point that, because a time was fixed in the contract, this makes the contract exclusive. This fact does not alter or qualify the rule, and obviously so; for if no time had been fixed, the law would imply a reasonable time, and such contracts would be exclusive for a greater or less time, with or without the time limit. We have read the authorities offered to sustain this contention, and find that

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most of them fall within some recognized exception to the rule. The contract provided that it was exclusive, or the authority was coupled with an interest, or the principal had acted in bad faith. In *Blumenthal v. Bridges*, 91 Ark. 212, 120 S. W. 974, 24 L. R. A. (N. S.) 279, one of the authorities relied on, it is said that, where a time limit is fixed, "the contract implies an exclusive right to sell within the time named." The authorities cited to sustain this proposition do not bear out the conclusion of the judge writing the opinion. On the contrary, they affirm our position, for in each of them the contract was by its terms "exclusive," or "sole," or coupled with an interest. Here the only interest is the commission, and it is uniformly held that this is not an interest, rendering the power irrevocable. 1 Am. & Eng. Ency. Law (2d ed.), 1217. Mechem, Agency, § 207.

The complaint did not state a cause of action, and the judgment of the lower court was properly entered. Affirmed.

GOSE, PARKER, and CROW, JJ., concur.

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[No. 10245. Department Two. June 25, 1912.]

MARY V. QUINN, *Respondent*, v. PETERSON & COMPANY,  
*Appellant*.<sup>1</sup>

MUNICIPAL CORPORATIONS—CONSTRUCTION OF DRAIN—LIABILITY OF CONTRACTOR—FLOODING BY SURFACE WATER. A city contractor making a fill in a street is not liable for the damages caused by water backing up in a depression and entering the plaintiff's cellar, where it appears that a box drain had been put in under the supervision of the city engineer to carry off the water, which was large enough to carry off the water ordinarily, but had become clogged up on one occasion, and there was no evidence of negligence or knowledge on the part of the contractor or city that the drain was insufficient or had become clogged or dammed up.

<sup>1</sup>Reported in 124 Pac. 502.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 18, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

*Herchmer Johnston* (Edward N. Sears, of counsel), for appellant.

*Lewis, Lohmann & Levine*, for respondent.

MOUNT, J.—Plaintiff brought this action to recover damages done to real and personal property caused by flooding the basement of her dwelling house. The case was tried to the court and a jury, and resulted in a verdict in favor of plaintiff for \$600. The trial court entered a judgment for \$400, upon plaintiff's remitting \$200 from the verdict. The defendant, Andrew Peterson & Company, has appealed.

The plaintiff is the owner of a lot on the southeast corner of Ninth avenue, northeast, and East Seventy-third street, in the city of Seattle. The lot fronts to the north on Seventy-third street forty feet, and to the west on Ninth avenue one hundred feet. A one-story frame cottage was erected upon this lot. This cottage had a basement with cement wall about four feet high. The lot to the north and east was higher than to the west and south. A natural depression existed at the rear or south end of the lot, which depression carried water to the westward during the rainy season of the year. There was no water in the depression during the dry season.

In November, 1909, the city of Seattle let a contract to appellant to grade and improve Ninth avenue, northeast, and East Seventy-third street. This work was to be done according to plans and specifications furnished by the city, and under the direction and superintendence of the city engineer. By the contract, Ninth avenue and Seventy-third street were to be filled about six feet on the north and west of plaintiff's lot, so that the natural surface of plaintiff's lot

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would be about four feet below the street grade. These streets at this point had never been graded or improved. Before any grading was done adjoining plaintiff's lot, the city required a drain box, twelve by seventeen inches inside measurement, to be placed in the depression, for the purpose of carrying off water. This drain box was first placed about seven feet upon the plaintiff's lot, and extended westerly and diagonally across Ninth avenue and property westerly thereof until it reached Seventy-third street. Afterwards the drain box was extended eastward across the plaintiff's lot. While this grading work was being done, the plaintiff employed another contractor to fill her lot around her house. After the grading work had been done upon the street, there was a heavy rain, and water accumulated upon the rear of plaintiff's lot and ran into the basement under the plaintiff's house. The result was that the concrete wall cracked, the house settled and was damaged, and some personal property in the basement was destroyed. This action was subsequently brought. The city of Seattle was not made a party. The complaint alleged that the defendant, Andrew Peterson & Company,

"while engaged in grading said street, carelessly and negligently, wilfully and wantonly failed, neglected and refused to provide a drain box of sufficient size, or make other sufficient provisions for the carrying away of the water which was then flowing and which might thereafter naturally flow in the natural stream or water course; that by reason thereof the waters in said stream or water course backed up and overflowed plaintiff's said premises and filled the basement under said house,"

and caused the damage.

It will be readily seen that the action is based upon negligence. The negligence alleged is that the defendants dammed up the stream, and refused to provide a drain box of sufficient size to carry away the water. There is no evidence whatever that the defendants dammed up the water, except the mere fact that the water did not flow through the drain

box upon one occasion referred to in the testimony quoted below. The plaintiff herself testified as follows:

"Q. Do you know what provision was made, if any, to carry away water? A. There was a small box drain built to cross Ninth avenue and end at our property line. Q. Do you know how large that box was? A. No, I don't, but it was very much too small and proved to block the water. Q. What happened thereafter then with reference to the water coming down there? A. Well, the water rushed down in its usual manner until it came in contact with this box. That threw it with force right over on our property, and it had no other outlet except to run down into our basement and fill it completely."

Her son testified in regard to the size of the drain as follows:

"Q. Your grounds were two feet above the street? A. About two feet. In front of the house they stood up a little higher. And when they came along with their fill and filled it on the west side, that is, Ninth, in putting this here box across the street they put the box in too small to carry away a flow of water which came from back to the southeast of the house. Consequently, when the rains came down, this here box would not carry away the water as fast as it came there and it backed it up and surrounded the house in the rear on the east side and got to a depth of about eight inches, I should judge."

This was all the evidence on the part of the plaintiff as to what caused the water to accumulate upon the plaintiff's premises. The evidence offered by the defendant was to the effect that the drain was large enough, and that it was built and put in position under direction of the city engineer in accord with the defendant's contract with the city. One of defendant's witnesses testified as follows:

"Q. Do you know what caused the back water there? A. I presume the end of the box was stopped up with debris. Q. You don't know positively? A. I do not. Q. You don't know whether that box was large enough, do you? A. I think it was, because the box below was large enough to carry it."



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Statement of Case.

It is plain from the whole evidence in the case that the box or drain was amply large enough to carry the water ordinarily, and the fact that the drain became clogged upon one occasion is not evidence that the defendant was negligent in the construction, or that it wilfully dammed up the drain. There is no evidence whatever that the city or the defendants had any notice or knowledge prior to the overflow that the drain was insufficient, or that it was clogged or dammed up, or that defendant caused debris to become lodged in the drain. There could have been no negligence, therefore, on the part of the defendants. This case is controlled by the case of *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859, where it was held in a case like this one that, where there was no violation of duty, there was no negligence. The trial court should have followed the rule there stated and dismissed the case upon the defendant's motion.

The judgment is reversed, and the cause ordered dismissed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

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[No. 10250. Department Two. June 26, 1912.]

CHARLES ZWICKEL, *Respondent*, v. AMERICAN SAVINGS BANK  
& TRUST COMPANY, *Appellant*.<sup>1</sup>

MONEY RECEIVED — FRAUD — NOTICE — EVIDENCE — SUFFICIENCY. Where a bank, holding a forged note and mortgage as collateral, had notice that their genuineness was denied, and received part of the purchase money when the owner sold the collateral and procured the bank to assign the same to the purchaser, who relied on the genuineness of the note and mortgage, the bank is liable to the purchaser for the money received by it in the transaction.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 26, 1912, upon findings

<sup>1</sup>Reported in 124 Pac. 386.

in favor of the plaintiff, in an action for money paid, after a trial to the court. Affirmed.

*John W. Roberts* and *George L. Spirk*, for appellant.

*Edward Von Tobel*, for respondent.

FULLERTON, J.—Sometime in June, 1910, one D. A. Hatfield and one D. M. Peeples borrowed from the appellant, American Savings Bank & Trust Company, the sum of \$500, executing a joint note to evidence the same. At the same time and as collateral security for the payment of the note, Hatfield assigned to the bank a note payable to himself for \$1,500, secured by mortgage on certain real property, purported to have been executed by A. A. Campbell and Laura H. Campbell. When the note to the appellant bank was about to mature, Peeples sought to find a purchaser for collateral note and mortgage. He took up negotiations with the respondent through his agent, Holland, and succeeded in selling the same to the respondent for practically the face value of the note. In consummation of the sale, Holland paid to the appellant bank, by a certified check, the amount due on the note of Hatfield and Peeples, and took from the bank an assignment of the collateral note and mortgage, and paid to Peeples the difference between the amount paid on the bank's claim and the amount he had agreed to pay for the note and mortgage. This transaction was had on September 15, 1910. Later on the same day, Holland discovered that the note and mortgage were forgeries. He thereupon sought out Peeples, and secured a return from him of the sum paid him as part of the purchase price of the note and mortgage, and made a demand upon the bank for the sum received by it, offering at the same time to return to it the note and mortgage. The bank refused to return the money, whereupon this action was begun to recover it. The action was tried in the court below without the intervention of a jury, and resulted in a judgment in favor of the respondent. The bank appeals.

The trial court rested its judgment on the finding that the bank knew, at the time it assigned the note and mortgage to the respondent, that the same had been forged and were fraudulent, and that the respondent did not know of the fact, but purchased the same believing they were genuine; finding, also, that he would not have purchased the note and mortgage had he known the truth concerning them. The appellant attacks these findings in this court, contending that they find no support in the record; contending, further, that the evidence shows the purchase of the note and mortgage to have been made from Peeples and Hatfield and not from the bank.

But we think the evidence justifies the conclusions reached by the trial judge. It is admitted that the bank's officers were informed, prior to the time it made the assignment to the respondent, that the purported makers of the note and mortgage denied their genuineness; and it appears that permission had been obtained from the bank's officers for an inspection of the original by the purported makers, and that the note and mortgage were assigned by the bank between the time the permission to inspect was obtained and the time appointed for the inspection. It may, be as the officers testify, that they had no positive information of the invalidity of the instruments; but we think, nevertheless, that they had notice sufficient to put them upon inquiry, and that their subsequent actions with reference thereto must be treated as if had with full knowledge of the facts. As to the further contention, it may be that the legal effect of the transaction was a purchase by the respondent of the note and mortgage from Hatfield; but the fact remains that a part of the purchase money was paid to the bank by respondent on the strength of his belief in the genuineness of the note and mortgage, that the bank knew that the purchase was made in consequence of that belief, and knew, moreover, that, if the bank gained by the transaction, the respondent stood to be defrauded of the amount of such gain.

These facts clearly justify a recovery on the part of the respondent, and it is unnecessary to pursue the inquiry further.

The judgment is affirmed

MOUNT, ELLIS, and MORRIS, JJ., concur.

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[No. 10198. Department Two. June 26, 1912.]

W. A. BASS, *Appellant*, v. MARK A. MATTHEWS, *et al.*,  
*Respondents*.<sup>1</sup>

**LIBEL AND SLANDER—PRIVILEGED COMMUNICATION—CHURCH PROCEEDINGS—REPORT OF COMMITTEE AS MALICE.** A church committee's report upon an investigation of a minister who desired to be called, made according to the established rules of the church of which the minister was a member, is absolutely privileged, whether it contains matter libelous *per se* or not; and when on its face it shows that it was made in good faith, it disproves malice.

Appeal from a judgment of the superior court for King county, Myers, J., entered October 27, 1911, dismissing an action for libel, upon sustaining a demurrer to the complaint. Affirmed.

*Irving H. Randolph* and *George E. Beardslee*, for appellant.

*Austin E. Griffiths*, for respondents.

MOUNT, J.—The plaintiff brought this action to recover damages for an alleged libel. The trial court sustained the defendants' demurrer to the amended complaint. Plaintiff refused to plead further, and the action was dismissed. Thereupon this appeal was prosecuted.

The complaint alleges that the plaintiff was one of the ministers of the presbytery of Seattle, a subdivision of the Presbyterian church in the United States within the synod of Washington; that from July, 1908, to April 1, 1909, the

<sup>1</sup>Reported in 124 Pac. 384.

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plaintiff occupied the pulpit of Lake Union Presbyterian church, at Fremont, in Seattle; that on April 16, 1909, the presbytery of Seattle adopted a resolution whereby five of the defendants were constituted a commission to investigate "all matters pertaining to the condition now existing in the Lake Union or Olivet church, and be empowered to act in the premises and report to the next meeting of the presbytery;" that on May 11, 1909, the committee made its report, which is set out at length in the complaint. This report, and the fact that a notice was posted on the door of the church that the report would be read in the church on a certain day, and was so read and published and sent through the mails, is made the basis of this action.

It appears from the complaint that the plaintiff, in March, 1909, had been acting as stated supply for the Lake Union or Olivet church for several months. He desired to be called as such stated supply for the ensuing year. At a meeting of the church held for that purpose, the plaintiff and certain members became dissatisfied with certain rulings, and left the meeting, and thereafter sought to establish another church. This condition called forth the appointment of the commission above referred to by the presbytery of Seattle. The first five pages of the report deal with the affairs of the Olivet church. The report then continues concerning the plaintiff: .

"The commission takes pleasure in recording that there is testimony to the fact that Mr. Bass is an able preacher and a hard worker. We take pleasure also in recording that he has exhibited talents of zeal well adapted to edify the church of Christ were they balanced by more quiet deliberateness, calm judgment and gentle, Christlike spirit. The commission is constrained to express its deep concern at the uncharitable and contentious spirit exhibited by him at the annual meeting of the church on March 31, 1909, and before the commission when it was convened in the church to hear Mr. Bass and his adherents. They are still more deeply concerned at the want of candor and frankness and evident attempts at evasion by Mr. Bass when called per-

sonally before the commission. This evasion and want of candor has been exhibited by no other parties on either side of this unhappy controversy."

The report then reviews the work of Mr. Bass since he was ordained into the ministry, stated the different pulpits he had occupied, and the condition of the churches when he came to them, his length of stay, and the progress of the church during his stay, showing that in about five out of six churches the membership had decreased. The report states: "This record is compiled from the minutes of the general assembly of the Presbyterian church in the United States from the year 1893 to the present time." The report then, after reviewing other matters, concludes:

"That the Lake Union church as at present organized should be sustained and supported as the alleged occupant of the territory known as the Lake Union field . . . . that the session be granted permission to supply its own pulpit until a stated supply be regularly secured or a pastor called."

It is argued by the appellant that this report sets the plaintiff out as a failure in the ministry of the church, and is libelous *per se*. We think the report is not libelous *per se*. But we need not discuss that question; because, if we concede that it is so for the purposes of this case, we are satisfied that the report was privileged. The plaintiff desired to be called or retained for the ensuing year as a stated supply in the church. Each member of that church, as well as the members of the superior governing body, had a right to know his faults as well as his merits, and they had a clear right to inquire into and disclose the matters concerning which the report was made. The investigation made was according to established rules of the church of which the plaintiff was a member, and to which he was bound to submit. 25 Cyc. 390; *Shurtleff v. Stevens*, 51 Vt. 501, 31 Am. Rep. 698. The report upon its face is so clearly made in good faith that it disproves whatever of malice may be alleged in the

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complaint. *Redgate v. Roush*, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236.

There is no merit, either in the appeal or in the case. The judgment is therefore affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

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[No. 10220. Department Two. June 26, 1912.]

THE STATE OF WASHINGTON, *on the Relation of George Holtzner, Respondent*, v. WILLIAM BOTHWELL, *as Clerk of the City of Seattle, Appellant*.<sup>1</sup>

ELECTIONS—MUNICIPAL PRIMARY ELECTIONS—FEES. Under Rem. & Bal. Code, § 4805, which provides that the state primary election law shall not apply to nomination of candidates for municipal elective offices in cities of the first class which have adopted a nonpartisan method of nominating candidates, the city clerk in such cities cannot collect the filing fee required by Id., § 4808 of the state law, the city charter making no provision for the payment of such a fee.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered January 16, 1912, in favor of the plaintiff, in mandamus proceedings, upon overruling a demurrer to the application. Affirmed.

*James E. Bradford* and *Howard A. Hanson*, for appellant.

*Hulet M. Wells*, for respondent.

MOUNT, J.—This proceeding in mandamus was brought in the lower court to compel the city clerk of the city of Seattle to accept and file the nominating petition of the relator as a candidate for the office of councilman in that city without the payment of a fee therefor. The only question presented is, whether the city clerk of Seattle is authorized to collect such fee under the city charter and state

<sup>1</sup>Reported in 124 Pac. 371.

laws. The lower court held that the clerk was not so authorized, and issued the writ. The city clerk has appealed.

Section 2 of the state primary election law provides, that all candidates for elective municipal offices,

“shall be nominated at a direct primary election held in pursuance of this act . . . Provided further, that the provisions of this act shall not apply to nominations of candidates for municipal elective offices in cities of the first class which have adopted or may hereafter adopt charters under section 10, article 11, of the state constitution, where such charters have provided or may hereafter provide a nonpartisan method or methods of nominating candidates for municipal elective offices; and all such cities shall have the right and power to provide in their charters for any method or methods of nonpartisan nomination of candidates for their elective offices as they may desire.” Rem. & Bal. Code, § 4805.

Section 5 of that act provides for certain fees from persons who shall desire to become candidates, and that, when such fees are for municipal offices, payment shall be made to the city clerks. Laws 1909, page 170; Rem. & Bal. Code, § 4808. The city of Seattle, a city of the first class, in March, 1910, amended its charter, and thereby adopted a nonpartisan method of nominating candidates for its elective offices. The city charter by this amendment provides a complete system or method for a nonpartisan primary nomination. It makes no provision for the payment of fees by persons who seek to become candidates at such primary nominating election. Counsel for appellant argue that the provisions of § 5 of the state primary law apply to this case, because the legislature intended only to authorize cities of the first class to adopt a nonpartisan method instead of a partisan method of nomination, and therefore that all the provisions of the state law apply to such cities except those provisions which relate to the partisan method. We think no such construction can be applied to the state law. As we have seen above, § 2 of the statute provides:



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“This act shall not apply to nominations of candidates for municipal elective offices in cities of the first class which have adopted . . . a nonpartisan method or methods of nominating candidates for municipal elective offices; and all such cities shall have the right and power to provide in their charters for any method or methods of nonpartisan nomination . . . as they may desire.”

This provision of the statute seems too plain for construction. Under its express terms, the act does not apply to cities of the first class which have adopted nonpartisan methods of nominating candidates for city offices. In short such cities are excluded from all its provisions, and are authorized to provide in their charters for any method of nonpartisan nomination they may desire. The city of Seattle did provide a complete method of nonpartisan nominations for city elective officers. It seems plain, therefore, that the act does not apply to the city of Seattle. The statute, in addition to providing that the act shall not apply to such cities, expressly provides that such cities shall have the right to provide for any method of nonpartisan nominations of candidates as they may desire. The payment of fees by persons who desire to file certificates and become candidates is as much a part of the method of nominating candidates as the provisions relating to voting, or preparing and distributing the ballots, or making returns of the vote when cast. In providing the method of nonpartisan nominations, the city made no provision for fees. If the city had desired to collect fees from candidates, a provision would have been made to that effect. No fees being provided for, none are collectible.

We are satisfied that the trial court properly construed the statute. The order appealed from is therefore affirmed.

ELLIS, MORRIS, and FULLERTON, JJ., concur.

[No. 10479. Department One. June 26, 1912.]

SARAH A. GUST, *Appellant*, v. ADOLPH A. GUST,  
*Respondent*.<sup>1</sup>

DIVORCE—SUIT MONEY—ALIMONY PENDING APPEAL—SHOWING—SUFFICIENCY. Where the action of a wife for a divorce was dismissed after a full hearing and appears to be without merit, and both parties are possessed of considerable property, and there is no community property, the supreme court will not grant suit money and temporary alimony pending the appeal; since the equities must be so strong or the interests in the property so mutual as to make it a matter of right rather than of privilege.

Motion by appellant filed in the supreme court May 27, 1912, for suit money and temporary alimony, pending appeal from a judgment of the superior court for King county, Myers, J., entered May 6, 1912, denying a divorce, after a trial on the merits. Motion denied.

*Edward Judd* and *E. B. McGregor*, for appellant.

*George W. Saulsberry* (*H. E. Foster* and *L. Y. Devries*, of counsel), for respondent.

CHADWICK, J.—This case was tried in the court below, and a decree rendered in favor of the defendant. Plaintiff appealed, and pending formal hearing, has applied to this court, by motion, for an allowance of \$125 per month alimony, \$1,303.43 suit money, and the sum of \$1,000 attorney's fees. The motion is based upon the record and files in the main case, and is supported by the affidavits of the appellant and her counsel. Respondent resists the motion, and has likewise filed affidavits.

Plaintiff alleges, that she has incurred an indebtedness on account of her appeal of \$94.60; that she has notes maturing between June 9, 1912, and October 21, 1912, aggregating \$678.40, all of which represents money obtained and

<sup>1</sup>Reported in 124 Pac. 504.

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expended in the preparation of her case. She also sets up the fact that she owns certain property upon which special assessments are due, and she further alleges that she has exhausted the credit of her property in raising the amounts referred to. Respondent is possessed of property of considerable value, but he too pleads that accumulated assessments, taxes, and interest, and the stagnated condition of the real estate market have all concurred to make it impossible for him to meet his own expenses. Appellant relies upon the following cases to sustain her motion: *Holcomb v. Holcomb*, 49 Wash. 498, 95 Pac. 1091; *Sullivan v. Sullivan*, 49 Wash. 508, 95 Pac. 1095; *Gallagher v. Gallagher*, 65 Wash. 810, 118 Pac. 4; *Gibson v. Gibson*, 67 Wash. 474, 122 Pac. 15.

The practice of entertaining petitions for suit money, alimony, and attorney's fees in this court is allowable, since the decision in the *Holcomb* case was pronounced, but it is not to be encouraged. Nor will this court grant the prayer of the petitioner unless the equities are so strong, or the interests in the property are so mutual, as to make the order one of right rather than of privilege. The whole record is not before us, but so far as we can ascertain from the motion and affidavits in support thereof, there are no equities shown that would warrant us in putting the burden of sustaining appellant's appeal, and her maintenance pending a hearing, upon the respondent. The parties were married November 10, 1910. Appellant began her action for divorce August 25, 1911. She charged respondent with adulterous intercourse with another woman. At the conclusion of her case, and without any contrary evidence, a decree was entered in favor of respondent. It is not contended that there is, or ever has been, any community property. The present application seems to proceed upon the theory that a wife can, because of her relationship merely, demand that her spouse meet the expenses of a suit for divorce. Law is the expression of reason, and when the reason ceases, the law fails. Formerly, when the property of the wife became vested in the

husband at the time of marriage, and latterly where the wife is in necessitous circumstances and her case seems meritorious, or where there is community property under the custody and control of the husband, such an order would be proper. But where the parties are dealing at arm's length, each of them possessed of property in greater or less degree, and the only real controversy is over the property of the husband, we find no warrant for an arbitrary order compelling him to pay the expense of a piece of litigation which the trial judge, after full hearing, has held to be without merit. It is true that appellant says her property is so involved that she cannot meet the expenses of her appeal and live pending its hearing; but, as we have intimated, respondent makes a like showing of a want of ready money. If the parties are telling the truth, poverty is appellant's misfortune, and as it may be in this case, respondent's advantage. A wife is entitled to be provided with means at the expense of the husband for "an efficient preparation of her case" on appeal. *Gallagher v. Gallagher, supra*. But she is not entitled as a matter of right to invade the property of her husband if she be otherwise provided for. *State ex rel. Lloyd v. Superior Court*, 55 Wash. 347, 104 Pac. 771, 25 L. R. A. (N. S.) 387; *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *Van Gelder v. Van Gelder*, 61 Wash. 148, 112 Pac. 86; *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653; *Gibson v. Gibson, supra*. This holding is not in conflict with *Holcomb v. Holcomb*, and *Sullivan v. Sullivan, supra*, where payment was sought out of community property in which the petitioner had an admitted interest.

The motion is denied.

PARKER, CROW, and GOSE, JJ., concur.

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[No. 10290. Department One. June 26, 1912.]

MARTIN LARSON, *Appellant*, v. F. L. STEWART,  
*Administrator, Respondent*.<sup>1</sup>

EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS—PREFERRED CLASSES—NOMINEES—RIGHT OF CREDITORS. Rem. & Bal. Code, § 1389, providing that administration of the estate shall be granted in the following order: (1) to the surviving husband or wife; (2) to the next of kin in a specified order, and (3) to principal creditors, creditors have no more than a privilege to pray for letters if the others do not exercise their preference, and the court may appoint the nominee of one of the preferred classes although the statute does not expressly give the right of nomination; in view of the provision that creditors cannot exercise their right until after the lapse of 40 days, and the implication of power in the court to exercise its discretion, and the provision authorizing the appointment of any suitable person if the heirs in writing waive their right.

Appeal from a judgment of the superior court for Cowlitz county, McKenney, J., entered March 18, 1912, granting letters of administration, after a hearing upon conflicting applications. Affirmed.

*B. L. Hubbell*, for appellant.

*Miller, Crass & Wilkinson* and *Percy P. Brush*, for respondent.

CHADWICK, J. — Andrew A. Hedemark died intestate, leaving an estate of real and personal property, situate in Cowlitz county. He left surviving him several children, two of whom are of legal age and entitled to letters of administration. The two children who were competent to administer the estate filed a petition sufficient in form to give the court jurisdiction, but waived their right to administer, and nominated F. L. Stewart, whom the court found to be a suitable and competent person, to be administrator of the estate. After due notice and some preliminary hearings, the petition of the heirs was heard, and at the same time, the court

<sup>1</sup>Reported in 124 Pac. 382.

considered the petition of Martin Larson, who is shown to be the principal creditor of the deceased, and whom the court finds to be in every way qualified to act as administrator. On the hearing, the court ordered that letters issue to Mr. Stewart, and Mr. Larson, the creditor, has appealed.

The question to be answered by this court is whether the nominee of a class preferred by the statute, being competent, can administer over a creditor of the deceased who is qualified to act. The answer to this question is to be found in the statute itself, and our decision must be controlled by the construction to be put upon it. Rem. & Bal. Code, § 1389, provides:

“Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order:

“(1) The surviving husband or wife, or such person as he or she may request to have appointed;

“(2) The next of kin, in the following order: 1. Child or children; 2. Father or mother; 3. Brothers or sisters; 4. Grandchildren;

“(3) To one or more of the principal creditors: Provided, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration, or if there be no relatives or next of kin, or if the heirs or one or more of the principal creditors, in writing, waive their right to administration, or if there be no principal creditor or creditors, then the court or judge may appoint any suitable and competent person to administer such estate.”

It is the contention of the appellant that this statute gives only a personal right to the persons preferred under the first two paragraphs, and that this right cannot be delegated or given over to another by nomination or otherwise; that having waived the right to exercise the statutory preference, an absolute right falls to the next class, and so on, until all classes have waived or it is made to appear that there are none coming within these definitions. In other words, that

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the right to administer is a valuable right, personal in character, granted by statute, and cannot be defeated except by a voluntary waiver. There are some cases which seem to sustain appellant, but when analyzed with reference to local statutes, we feel that they are not so far conclusive as to warrant us in accepting them as controlling. The appellant recognizes this, saying that he rests his contention solely upon the statute.

Whatever may have been held elsewhere, we prefer to treat the question as an open one in this state. It was the policy of the courts from the beginning to give the administration of estates over to those having an interest therein, the right originally being in the state or in the king. Statutes have not changed the rule in this respect, excepting in so far as they establish the order of preference. The reason for the rule remains; that is, that if possible the administration of an estate should be put in the hands of those who have the greatest interest therein. On the other hand, the right of a creditor to administer was not recognized in the beginning, and although finally admitted at common law, it has, we believe, come to be regulated wholly by statute in this country. The right of the creditor is sustained, as the order of our statute implies, upon the theory that there are no parties in interest or, if so, they have, by the lapse of time, waived their right. In such event, the creditor is given a right, to the end that the payment of a just debt shall not be defeated for the want of an administration.

While holding that a surviving husband or wife, or the next of kin in the order named, has a "right" in the strict sense, one founded upon natural justice and equity, we are of opinion that the creditor has no more than a privilege to pray for and receive letters, if the others do not exercise their preference. The concrete point involved in this case is, Can a preferred class waive its right to administer and nominate a third party to the exclusion of the creditor? It has

been rarely if ever held that any preferred person could nominate another and make his will binding on the court, nor do we so hold. But it is generally held that, where there is a right of nomination, the court will give heed to the wishes of the interested parties, and upon a showing of competency, will exercise its discretion in favor of the nominee of the moving parties. Our statute does not, by its express terms, give a right of nomination to any of the enumerated classes, save the surviving husband or wife. They may request that another be appointed. The third paragraph of § 1389 seems to imply that it was not the intention of the legislature to circumscribe the power of the court to exercise its discretion, when called upon to act, for the best interests of the estate. A natural right in the creditor is not recognized. His privilege cannot be exercised until after the lapse of forty days, and a fair reading of the statute implies that he has no right unless those interested waive their right of administration. This paragraph provides for the appointment of one other than those enumerated, and upon the condition (reading it with reference to the instant case) "provided that . . . the heirs . . . in writing waive their right to administration, then the court or judge may appoint any suitable competent person to administer such estate."

We are not unmindful of the insistence of counsel that each of the conditions named in the proviso must concur before a stranger can be appointed; that is, that there must be no relative or next of kin, and that the heirs and creditors must have waived. But this would compel us to substitute "and," the conjunctive, for "or," the disjunctive, as it occurs in the law; and thus, in changing the letter, crush the spirit of the statute.

Some courts have held that these statutes are mandatory. *Cooper v. Cooper*, 43 Ind. App. 620, 88 N. E. 341; *In re Daggett's Estate*, 15 Idaho 504, 98 Pac. 849. And this may be so in so far as the rights of relatives and next of kin are concerned. But we prefer to hold that it is not so to the



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extent of giving a creditor preference over the nominee of a preferred class. The right of the creditor is saved when there is a due administration, and to hold that he has rights beyond this would be to hold, as some courts seem to say, that the right to administer an estate is a valuable property right, personal in character, and that when once waived cannot be recalled as against one of a succeeding class. These rulings do not commend themselves to us as either just or reasonable. We prefer to hold that the waiver contemplated by our statute is an absolute renunciation, and that a waiver with a nomination of another party is a qualified waiver which in no way forfeits the interest of the nominors in the estate.

As suggested in the beginning, the cases are of but little aid in construing our statute, because the laws differ in most of the states; and while there may be some of them identical with our own, we have not, in the time we have had to devote to this case, found them. The cases we have read from other states would indicate that there are none. However, we find in North Carolina a statute giving the right of administration, (1) to the husband or widow, (2) to the next of kin, (3) to the most competent creditor. We find no express right of nomination in the code of that state, as there is in that of California, for instance. Nor is there anything to imply the right, as we believe there is in our own code. The court held, but without going into the reasons which might have been adverted to to sustain the decision, that the appointment of one designated by the next of kin would be sustained in preference to the petition of the largest creditor. *Little v. Berry*, 94 N. C. 433. While we have not found a clear statement of the rule, as we have undertaken to lay it down, in any of the cases, nevertheless expressions on the part of textwriters seem to be in harmony with it.

Conceiving, as we do, that the statute is not arbitrary or mandatory in so far as the right of creditors is concerned, and does not overcome the power of the court to exercise his

discretion to appoint the nominee of one of the first two classes if he be a fit and proper person, the following quotations are apt:

“Probably the most important rule guiding the discretion of the judge in modern practice, when he has a discretion to choose among several who may be appointed administrators, is that he shall choose the one whom those interested in the estate, or most of them, wish to have appointed, if no material objection exists to such appointment. And this rule is sometimes enjoined by statute.” Rice, Probate Law & Practice, p. 327.

“Even granting, as we must, that the court is not bound by the nomination made by a widow or the kindred first entitled to administer, yet the wishes and preferences of those having the greatest interest in preserving the estate are entitled to great weight. . . . And hence the appointment, at the court’s discretion, of any suitable person upon whom the next of kin entitled to the office, or a majority of them, may agree, is highly favored in American practice; the rights of more remote kindred, creditors and all strangers in interest being postponed to their expressed choice accordingly . . . . Inasmuch as the regular administration of estates, sometimes large and complicated, whether testate or intestate, is so highly favored at the present day, the selection of third persons of integrity, experience, and sagacity for such responsible duties must often be most desirable. And if a testator makes such a selection, or associates others with his next of kin or legatees in the trust, for reasons admittedly sound, there seems no good reason why the next of kin themselves, if the estate be intestate, should not exercise a corresponding discretion and nominate some trustworthy friend rather than forfeit all claim to administer by failing to qualify personally for the office.” Schouler, Wills & Administration, p. 357, note 3.

Believing, then, that the right of the creditor depends wholly upon the nonaction of the classes referred to in paragraphs 1 and 2 of the statute, and that the waiver of their right within the time limited gives the court power to appoint their nominee if he be a suitable and competent per-

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son, and that power having been exercised in favor of the nominee, we unite in voting an affirmance of the judgment.

PARKER, CROW, and GOSE, JJ., concur.

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[No. 9862. Department One. June 26, 1912.]

MARY W. BARRETT, *Respondent*, v. ELLEN S. H. MONRO  
*et al.*, *Appellants*.<sup>1</sup>

LANDLORD AND TENANT—RENT—DEPOSIT AS LIQUIDATED DAMAGES. A stipulation in a lease that a deposit of \$1,200 made at the beginning of the term shall be held by the lessors to indemnify them against any loss or damage which they may sustain by reason of any violation of the terms of the lease on the part of the lessees, as liquidated damages, is one for liquidated damages and not merely for security, and entitles the lessor to retain the whole deposit, upon termination of the lease for nonpayment of rent; the actual damages from default being incapable of exact determination.

DAMAGES — LIQUIDATED DAMAGES — REASONABLENESS — LANDLORD AND TENANT. Liquidated damages in the sum of \$1,200, for the lessees' breach of a lease is not unreasonable where the total rent for the five-year term amounted to \$36,000.

LANDLORD AND TENANT—RENT—LIQUIDATED DAMAGES—WAIVER. The retaking of possession for default in the payment of rent does not waive the lessor's right to the liquidated damages stipulated for in the lease.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 24, 1911, upon findings in favor of the plaintiff, in an action for money paid, after a trial to the court. Reversed.

*Revelle, Revell & Revell, H. R. Clise, and C. K. Poe*, for appellants.

*John D. Dill and Foster & Worthington*, for respondent.

CROW, J.—There is no serious dispute as to the facts in this action. On April 15, 1909, defendants' predecessors in interest, as landlords, executed and delivered to plaintiff's

<sup>1</sup>Reported in 124 Pac. 369.

predecessor in interest, as tenant, a five-year lease upon an apartment house, in the city of Seattle, for a rental of \$36,000, payable from the 1st to the 5th of each month in advance installments of \$600 each. At the commencement of the term, the lessee made the first payment, and also deposited with the lessors the sum of \$1,200, relative to which the lease contained the following material stipulations:

"Party of the second part hereby agrees at the time of the execution of this lease to pay to the parties of the first part the sum of twelve hundred (\$1,200) dollars, which sum shall be held by the parties of the first part to indemnify them against any loss or damage which they may sustain by reason of any violation on the part of the party of the second part of the terms, covenants and agreements contained in this lease as liquidated damages.

"If said party of the second part faithfully performs and complies with all the conditions, stipulations and agreements contained in this lease on his part to be performed, then the parties of the first part agree to apply said twelve hundred (\$1,200) dollars in payment of the monthly rental due for the last two months of the part of this lease."

Defendants have succeeded to all rights and liabilities of the original lessors, and plaintiff has succeeded to all rights and liabilities of the original lessee. All monthly installments of rent were paid until December, 1910, at which time plaintiff made default. On December 6, 1910, defendants, as lessors, served upon plaintiff, as lessee, the statutory three-day notice to pay rent or surrender the premises. Plaintiff continued in default. On December 10, 1910, the lessors commenced an action of unlawful detainer, and obtained a writ of restitution. Thereupon the lessee surrendered the premises and commenced this action to recover the \$1,200 deposit. Defendants as lessors asserted their right to retain the \$1,200 in satisfaction of their liquidated damages, as agreed in the lease, while plaintiff insisted that the deposit was made as security for payment of rent only, and not to satisfy liquidated damages. The trial court held with plaintiff, found she was liable for ten days' rent in

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December, 1910, deducted the same from the deposit, and entered judgment in her favor for \$1,000, interest and costs. The defendants have appealed.

The question before us is whether the deposit was to be applied in payment of appellants' liquidated damages. We hold that it was. Respondent contends that the deposit was to secure payment of the monthly installments of rent as they matured; that appellants themselves terminated the lease; that thereafter they were entitled to no rent; that they resumed possession; that they succeeded to the occupancy and use of the property; and that they cannot retain possession and appropriate the \$1,200 as liquidated damages. Respondent's position leads to the conclusion that she, as lessee, would be entitled to remain in possession without payment of rent until her defaults amounted to a sum equal to the \$1,200 deposit, and that appellants would be required to permit such default without terminating the tenancy, as they could apply the deposit in satisfaction of the delinquent rent. This construction would read into the lease a stipulation which it does not contain. Had appellants thus applied the deposit, and had the default continued until it was exhausted, they would have been without security for future rent, or for damages which might result from a further breach, and thereafter would have been subjected to a constant liability of losing their lease for the remainder of the term, without certainty of obtaining another tenant at an equally remunerative figure. They would also have been subjected to any damages they might sustain in recovering possession, and by reason of depreciation in rental value for the remainder of the term.

It was respondent's duty to make the stipulated monthly payments. Her failure constituted an unquestioned breach of the contract which subjected her to a termination of the lease and payment of the stipulated liquidated damages. When her breach occurred, appellants were entitled to give the statutory notice to terminate the tenancy in the event

of her continued default, and thereafter retain the deposit in satisfaction of their liquidated damages. They were not required to permit a continuance of the default, and thus increase their damages to such an extent that the liquidated sum would be insufficient to protect them. The contract had no such purpose in view. It is manifest that the parties agreed upon liquidated damages because their exact measurement could not be readily made. The sum agreed upon is not unreasonable, in view of the value and importance of the entire lease. The term had more than three years to run when respondent's default occurred. At the date of the lease and also at the date of respondent's breach, it was impossible to determine the exact damages appellants might thereafter sustain in loss of rentals, or by reason of their inability to secure another tenant for a portion of the term at as remunerative a rental. Realizing this difficulty of making an exact measurement of such damages, should a breach occur, and appreciating the fact that appellants might incur expense in recovering possession, in securing new tenants, in the possible necessity of making expensive changes or improvements as a condition precedent to obtaining a new tenant, and also in the possible depreciation of rental value, the parties agreed upon \$1,200 as liquidated damages.

Respondent, in support of her contention that the \$1,200 was deposited as security only, and that it could in no event be retained by appellants as liquidated damages, cites *McDaniels v. Govey*, 30 Wash. 412, 71 Pac. 12. The instrument upon which that action was brought did not purport to stipulate any particular sum as liquidated damages, but was held to be an indemnity bond imposing a penalty. In an action on an instrument of that character, such damages only could be recovered as would be susceptible of proof by ordinary rules of evidence. In *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1, we said:

“Generally speaking, it may be said, that when the damages arising from the breach of the contract which the obli-

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gation is given to secure, are uncertain in their nature and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate as to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages and not a penalty, such a stipulation will be held to be one for liquidated damages."

The fallacy of respondent's argument lies in her assumption that the \$1,200 was advanced as security only. She ignores the probable contingency that a loss of the tenancy might cause damages to appellants difficult of ascertainment, whether termination of the tenancy resulted from a wrongful and voluntary surrender by respondent or from respondent's default in payment of rent, coupled with appellants' election to then terminate the lease. By exercising their election to terminate the lease, appellants did not waive their right to retain the liquidated damages. The default which caused such termination originated with respondent. Stipulations of the lease which this court had under consideration in *Dutton v. Christie*, 63 Wash. 372, 115 Pac. 856, are not identical in form of expression with those of the lease now before us. Yet similar principles were involved in that case, and the doctrine there announced is controlling here. There the lease expressly recited that it was executed in consideration of the payment of the deposit, as well as for other considerations. That form of expression is not used in the lease now before us, yet the \$1,200 here involved was paid at the date of the lease, was necessarily a part of its consideration, and was one of the moving causes for its execution. Unquestionably it would not have been made without the deposit of \$1,200 coupled with the stipulation that it should be applied as liquidated damages in the event of the lessee's breach. Appellants were entitled to retain the \$1,200 in satisfaction of their liquidated damages.

Reversed and remanded, with instructions to dismiss.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 10072. Department One. June 26, 1912.]

WILLIAM SARGINSON, *Appellant*, v. TURNER INVESTMENT  
COMPANY, *Respondent*.<sup>1</sup>

MECHANICS' LIENS — PROCEEDINGS—SEPARATE HOUSES—SEGREGATION OF ACCOUNT—NECESSITY. One mechanics' lien on four houses belonging to the defendant cannot be asserted for a balance due the contractor on one entire contract for the four houses and one other house belonging to another in which the defendant had no interest, where the plaintiff did not keep separate accounts with the several buildings and cannot segregate the account against each property.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 27, 1911, upon findings in favor of the defendant, dismissing an action to foreclose a mechanics' lien. Affirmed.

*Bell & McNeil (Roney & Loveless, of counsel)*, for appellant.

*Wm. Parmelee*, for respondent.

CROW, J.—Action by William Sarginson against H. S. Turner Investment Company, a corporation, and others, to foreclose a single lien for labor and materials, furnished in the construction of four dwelling houses, upon lots in the city of Seattle belonging to the defendant corporation. From a judgment of dismissal, the plaintiff has appealed.

The controlling issue of fact is whether one Okey J. Gregg, with whom appellant claims a contract for the erection of the buildings, was the architect and agent of the H. S. Turner Investment Company. The trial court found that he was not, that appellant had no contract with respondent corporation, and that he is not entitled to a lien. No good purpose would be served by repeating the evidence. We have given it careful consideration, and conclude the findings of the trial court must be sustained.

<sup>1</sup>Reported in 124 Pac. 379.



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Syllabus.

It appears from the record that appellant, by one written instrument, contracted with Gregg for the construction of five dwelling houses, one to be built on a lot belonging to a third party in which the respondent Turner Investment Company had no interest. It further appears that appellant did not keep separate accounts with these several buildings for labor and material furnished in their construction; that, without separation or segregation, he now asserts one lien on all four houses built on the lots of the Turner Investment Company, for the sum remaining due upon the entire contract. This cannot be done, and if no other reason existed, appellant's alleged lien would fail for the want of segregation of accounts against each property. *Knudson-Jacob Co. v. Brandt*, 44 Wash. 68, 87 Pac. 43.

The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

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[No. 10255. Department One. June 29, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE H.  
WILSON, *Appellant*.<sup>1</sup>

CRIMINAL LAW—DEFENSE—INSANITY — PLEA—WAIVER —SUSPENSION OF JUDGMENT. Under Rem. & Bal. Code, § 2174 *et seq.*, providing for a special plea of insanity and the method of trial, when an accused person is mentally irresponsible at the time of trial, the plea is waived if not interposed before jury trial, and hence cannot be urged in the supreme court as ground for suspending judgment.

CRIMINAL LAW—INSANITY AFTER CONVICTION—DETERMINATION—JURISDICTION—SUSPENSION OF JUDGMENT. Where a person convicted of crime has since become insane, the superior court has original jurisdiction, notwithstanding an appeal to the supreme court, to determine the question of his sanity and if insane to suspend the judgment; hence the supreme court will not entertain a motion to suspend judgment until the question of insanity is determined.

<sup>1</sup>Reported in 124 Pac. 1125.

Motion filed in the supreme court June 8, 1912, to stay an affirmance of a judgment of the superior court for Thurston county, Mitchell, J., entered November 15, 1911, upon an appeal from a conviction of murder in the second degree, pending an inquisition of lunacy. Denied.

*C. E. Collier* (*Chas. Ethelbert Claypool*, of counsel), for appellant.

*John M. Wilson*, for respondent.

CHADWICK, J.—Defendant George H. Wilson was convicted of the crime of murder in the second degree, in the superior court for Thurston county. The judgment of conviction was affirmed in this court on May 23, 1912. On June 6, defendant, by his attorneys, filed a motion in the superior court, praying for the appointment of a lunacy commission to examine the defendant with reference to his insanity at the time of the trial and at the present time. On June 8, defendant by his attorneys filed a motion in this court praying:

“That an order be entered herein suspending, setting aside and holding for naught that certain judgment which was entered in this court, the same being filed May 23, 1912, and being numbered No. 10255, the same being the case of state of Washington, respondent, vs. George H. Wilson, appellant, for the reason that the said George H. Wilson is now insane and has been insane at all times since on or about October 1st, 1911, and that an order be entered in this court suspending, setting aside and holding said judgment of this court for naught pending the hearing of the petition of defendant in the superior court of the state of Washington for Thurston county, upon the sanity of the above named defendant, George H. Wilson, and as to whether or not he has been insane at all times since on or about October 1st, 1911, and is now insane.”

This motion is supported by affidavits tending to show that the defendant was insane at the time he was tried, and has ever since been, and is now, mentally irresponsible. The record before us shows that, since the filing of these motions,

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the judge of the superior court has denied the application there made, upon the principal ground, as we gather from the argument, that, inasmuch as no remittitur had gone down from this court, he had no jurisdiction to hear or determine anything with respect to the liberty of the defendant. Assuming that this court has complete jurisdiction, counsel for defendant have brought this motion on for hearing, and have suggested in argument that they expect to supplement it by petition for mandamus, to compel the superior court to proceed with the examination pending the stay of our judgment.

Counsel relies upon the elementary principle that an insane person shall not be put to trial for his life or liberty, and now contends that, if he can show that defendant was insane at the time of the trial, his liberty, subject of course to incarceration for present insanity, can be obtained by order of the court. The case of *State ex rel. Mackintosh v. Superior Court*, 45 Wash. 248, 88 Pac. 207, is relied on, but that case can have no controlling force here, because the application for a commission was made before the trial, and for the further reason that, since that decision was rendered, the legislature has taken notice of the lack of any statute defining a procedure in such cases, and by express enactment has provided for the manner of trying the question of insanity at the time of the trial. Rem. & Bal. Code, § 2174, provides that this may be determined by the jury under a special plea. Succeeding sections point the proper procedure in the event that the jury finds mental irresponsibility at such time. These statutes are ample to protect the rights of a defendant, and the fact that such plea was not interposed warrants us in holding that the question was waived. In our judgment, this holding does no violence to the rule that an insane person shall not be put to trial; for, as we read the statutes, although that fact were proven, it would not operate to discharge the defendant, but only work a continuance until such time as, in the judgment of the prosecuting officers, his

reason became restored. We think the plain inference to be drawn from a reading of § 2174 is that such plea must be interposed before the case is submitted to the jury; and that, if it comes thereafter, it is too late.

In holding that the question of insanity at the time of the trial is not now open to the defendant, we do not want to be understood as holding that his present mental condition cannot be inquired into. The superior court has original jurisdiction in such cases, and its exercise does not depend upon any order or judgment of this court, and the mental condition of defendant may be determined without in any way conflicting with any judgment we may render, or may have heretofore rendered. If the fact is found so to be, its legal effect would be to suspend our judgment, which is based on the merits, the plea of not guilty, and in no way limits the authority or jurisdiction of the superior court to take cognizance of facts and issues subsequently arising.

The motion is denied.

PARKER, CROW, and GOSE, JJ., concur.

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[No. 10279. Department One. June 29, 1912.]

W. M. MEACHAM *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.<sup>1</sup>

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS TO FINDINGS. One general exception to the refusal of appellant's proposed findings is insufficient to obtain a review of the evidence to determine whether findings unexcepted to are supported.

Appeal from a judgment of the superior court for King county, Main, J., entered February 15, 1912, upon findings in favor of the plaintiffs, in an action on contract, after a trial to the court. Affirmed.

<sup>1</sup>Reported in 124 Pac. 1125.

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*James E. Bradford and William B. Allison*, for appellant.

*Preston & Thorgrimson and Harry E. Wilson*, for respondents.

PARKER, J.—The plaintiffs commenced this action in the superior court, to recover damages which they claim resulted to them from the refusal of the city of Seattle to permit them to complete the performance of three certain contracts, entered into with the city, by which they were to make improvements upon certain portions of the electric lines of the commercial electric lighting system of the city. They claim damages in a sum equal to the amount of profits they would have realized upon the portion of the improvement they were prevented from constructing under the contracts, which they set up in three causes of action. They also claim, in another cause of action, compensation for a small amount of extra work performed in connection with one of the contracts. Trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs, from which the city has appealed.

The principal contention of counsel for the city is that the evidence does not support the findings of fact made by the court. We are not able to find in the record any exceptions relating to the court's findings, other than a notation in the minutes of the court as follows: "Defendants proposed findings and conclusions refused. Exception." Assuming that this can be regarded even as a general exception, it is clear from our former holdings that it does not entitle appellant to a review of the evidence in this court for the purpose of determining whether or not it is sufficient to support the findings. *Fender v. McDonald*, 54 Wash. 130, 102 Pac. 1026, and cases cited. We therefore accept the facts found as true. There is practically no room for argument against the sufficiency of the facts found to support the judgment.

Some contention is made that the complaint fails to state

a cause of action. This claim was first made at the commencement of the trial, after the city had answered the complaint upon the merits. The question is presented here practically without argument and without any citation of authorities. It is without merit, and we think does not call for discussion.

The judgment is affirmed.

CROW, CHADWICK, and GOSE, JJ., concur.

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[No. 9961. Department One. June 29, 1912.]

IRA ERVIN, *Appellant*, v. NORTHERN PACIFIC RAILWAY  
COMPANY, *Respondent*.<sup>1</sup>

MASTER AND SERVANT—INJURIES—NEGLIGENCE—OPERATION OF RAILROADS. A complaint by a track worker, who sustained a hernia through extraordinary exertions in removing a hand car from a track when an engine was approaching, is demurrable for want of sufficient facts, where there was no allegation that he was ordered to use extraordinary exertion, that an insufficient number of trackmen were employed, the engine out of repair, or not under sufficient control to avoid a collision, the track not in proper condition, or that the hand car should not have been on the track in the first instance.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 5, 1911, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a track worker. Affirmed.

*Robert McMurchie* and *M. J. McGuinness*, for appellant.  
*C. H. Winders*, for respondent.

CROW, J.—Action by Ira Ervin against Northern Pacific Railway Company, a corporation, to recover damages for personal injuries. A demurrer to the amended complaint was sustained. The action was dismissed, and the plaintiff has appealed.

<sup>1</sup>Reported in 124 Pac. 690.

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Opinion Per CROW, J.

The question presented is the sufficiency of the amended complaint. Appellant in substance alleged, that he was employed as a track worker for respondent; that over him was a foreman, also employed by respondent; that on October 7, 1908, the foreman carelessly and negligently permitted a hand car to remain on respondent's railway track in such a position that it was liable to become an obstruction to approaching trains; that an engine approached from a side track, and the foreman directed appellant and other track workers to remove the hand car; that they proceeded to obey the order, but before they had completed this task, the foreman changed his order and directed them not to remove the hand car, but to shove it back upon the track; that it was necessary for appellant to walk behind the hand car, between handles which extended twenty-four inches from its deck; that while he and the other trackmen were thus pushing the hand car, the engine was approaching; that after they had shoved the car about one hundred and twenty yards, and when they were in danger of being run down by the engine, the foreman again directed them to throw the hand car from the track; that the engine was near at hand; that appellant had no means of escape other than to obey the last order, which he and the other men did; that, to get the hand car from the track before being struck by the engine, it was necessary for appellant to use extraordinary physical efforts, which he did, and that he thereby sustained a hernia, the injury of which he complains.

Appellant has devoted his entire argument to a discussion of the issue of contributory negligence, which he himself raises. Respondent concedes he was not negligent, but insists that the allegations of the complaint fail to disclose any negligence on its part as the proximate cause of the accident. This contention must be sustained. Permitting a hand car to temporarily remain upon a railway track does not of itself constitute negligence, provided there be time for its removal before it can be struck by an engine or train. The amended

complaint not only discloses the fact that there was ample time to remove the hand car before it could be struck by the approaching engine, but also shows that it was removed. The only cause of appellant's injury was his overexertion. The foreman did not order him to use extraordinary efforts. There is no allegation that an insufficient number of trackmen were employed, that the engine was out of repair, that the track was not in proper condition, that the hand car should not have been on the track in the first instance, nor that the approaching engine was not under sufficient control to avoid a collision. The circumstances pleaded show an unfortunate accident to appellant, but fail to show any negligence on the part of respondent for which it can be held liable.

The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.



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[No. 10011. Department One. July 1, 1912.]

PHILIP ROHSNAGEL *et al.*, *Appellants*, v. NORTHERN PACIFIC  
RAILWAY COMPANY, *Respondent*.<sup>1</sup>

WATERS AND WATER COURSES—SURFACE WATERS—DIVERSION—LIABILITY—RAILROAD EMBANKMENT. A railroad company is liable for flooding lands, where by its embankment, it raised and collected the periodical floods of a river and discharged the same through a culvert in an unusual volume and with excessive force upon plaintiff's lands, which it thereby washed away and injured; the principle that surface water is an outlaw and common enemy not warranting the collection of surface water in a considerable quantity to be turned in concentrated form through a ditch or culvert upon the premises of another.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 1, 1911, upon sustaining a demurrer to the complaint, dismissing an action for damages to property. Reversed.

*Hathaway & Alston*, for appellants.

*Geo. T. Reid*, *J. W. Quick*, and *L. B. da Ponte*, for respondent.

CROW, J.—Action by Philip Rohsnagel and Fredericka Rohsnagel, his wife, against Northern Pacific Railway Company, a corporation, to recover damages. A demurrer to the second amended complaint was sustained, the action was dismissed, and the plaintiffs have appealed.

The only question is whether the second amended complaint, hereinafter called the complaint, states a cause of action. The following plat, marked Exhibit "A," is attached to and made a part of the complaint:

<sup>1</sup>Reported in 124 Pac. 900.



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of the property of the plaintiffs, hereinbefore described, and that the property hereinbefore described, and all of the land lying between that and the Snohomish river is in what is known as the Big Marsh, and for more than fifty years last past has been and now is subject to overflow annually, by said Snohomish river, during ordinary freshets, and that such overflow has during all of said time done no damage to said property, but, on the contrary, has deposited quantities of alluvium, which has been and now is of great benefit to the plaintiffs' said land.

"(5) That at all times herein mentioned, the said defendant has owned and does now own a right-of-way through sections 30 and 31, twp. 28 north, of range 6, east W. M.; and sections 24 and 25, twp. 28 north, of range 5 east W. M., in Snohomish county, Washington; that for about two miles southerly of plaintiffs' land hereinbefore described, and a mile and a half northerly thereof, the said right of way of said railway company runs substantially parallel with the westerly side of said Snohomish river, and about sixty rods westerly of the main channel of said river, and immediately easterly of the plaintiffs' land above described; that annexed hereto, marked "Exhibit A," and made a part of this complaint is a plat showing the plaintiffs' said land, the river and the right of way of the railroad company as it passes over and along that part of the territory in the immediate vicinity of the plaintiffs' said land.

"(6) That from time immemorial, during the ordinary freshets of said Snohomish river, the river extended and extends in a solid body of water, flowing in the direction of the natural flow of said river, from about a quarter of a mile westerly of the plaintiffs' said land to some distance easterly of the main channel of said river.

"(7) That about fifteen years ago the defendant elevated its said roadbed from four to eight feet above the natural level of said land, and filled solidly under its tracks, forming an embankment or dike, which caused the water from the river, in ordinary floods of said river, to rise from two to three feet higher on the easterly side of said railway than it would on the westerly side thereof.

"(8) That during the month of November, 1906, the said embankment washed out for a distance of about eighty or one hundred feet immediately opposite to the plaintiffs' said land and immediately opposite the buildings located

thereon, as hereinafter described; that thereafter and in the same year or during the spring of 1907, the defendant placed a culvert under said track about fifty (50) feet in width immediately opposite to the buildings of the plaintiffs, as hereinafter described, which culvert it has maintained at all times thereafter; that during ordinary floods the water rises as above stated higher on the easterly side than it does on the westerly side of the right of way, caused by said embankment, which causes a great current of water to rush through said culvert on to the plaintiffs' land and much more water than would go upon plaintiffs' said land if the river were permitted to flow in its natural course.

"(9) That prior to the wash-out hereinbefore complained of, the plaintiffs had built a dwelling house at the point marked "B" on said plat, a barn and outhouses at the point marked "C" on said plat at a cost of three thousand (\$3,000) dollars, and have made other improvements on said land of the value of one thousand (\$1,000) dollars, and that said land was worth before it was damaged as hereinafter alleged, including the buildings, seven thousand (\$7,000) dollars.

"(10) That there is no natural watercourse in an easterly direction or in any other direction, except from said Snohomish river, during freshets therein, at the point where said culvert is located, and that the defendant owns the land under and along the culvert and that there is no railway or other crossing at or near said culvert, and that the culvert is wholly unnecessary for the purpose of permitting the surface water to drain from the defendant's said land or from the plaintiffs' land, and that said culvert is wholly unnecessary for the purpose of preventing the surface water from going upon the plaintiffs' land or from going upon the defendant's said right of way or the defendant's land, and that it is wholly unnecessary for the purpose of protecting the defendant's land or right of way or roadbed, or the public against the floods of said river.

"(11) That during the freshet, high water or flood of the fall of 1908, and each succeeding annual flood thereafter, the roadbed of said defendant, elevated as aforesaid, has caused the water to rise about three feet higher on the easterly side thereof than it was on the westerly side, and has caused the water to accumulate upon its right of way and on the easterly side thereof, and to be forced through said culvert or ditch so constructed by the said railway com-

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pany with great force, and that in so doing the said water has washed a great hole or gully on the plaintiffs' said premises at the point marked "D" on the plat annexed hereto; that the said hole so washed is from forty to seventy feet in width, and from four to eight feet in depth, and about two hundred fifty feet in length, and extends up to within twenty-five feet of the dwelling house of said plaintiffs, constructed as aforesaid, and within thirty feet of the barn of said plaintiffs, constructed as aforesaid, and that it is filled with water; that the water remains in it during the entire year and becomes stagnant during the summer months and thereby creates disease germs and jeopardizes the health of the plaintiffs and their family."

The complaint further alleges that plaintiffs have been damaged in the total sum of \$6,000.

Respondent, in support of the order sustaining the demurrer, contends that the facts alleged are substantially identical with those pleaded in *Harvey v. Northern Pac. R. Co.*, 68 Wash. 669, 116 Pac. 464; that surface water is an outlaw and a common enemy against which respondent may protect itself and that, under the doctrine of the *Harvey* case, any damages appellants may have sustained are *damnum absque injuria*. Appellants admit that surface water is an outlaw and common enemy against which a property owner may properly protect himself; but insist that neither the doctrine of the *Harvey* case, nor of any other case, will protect respondent from liability for the damages that have resulted to their land by reason of respondent's acts in controlling the water in the manner alleged in the complaint. A comparison of the complaint and plat in this action with those in the *Harvey* case will disclose a material variance. Here the respondent constructed a culvert through its embankment in such a manner and at such a point as to discharge surface water through the culvert upon appellant's land to their injury. No similar act was pleaded in the *Harvey* case. The only reasonable inference from the allegations of the complaint in this action is that the culvert was constructed through the embankment for the express purpose of discharg-

ing the water towards and upon appellants' land. In the *Harvey* case we said:

"Respondent does not contend it can collect water on its right of way by a ditch or other means, and discharge it on appellant's premises; nor does it contend it may lawfully create an artificial pool or collection of water upon its premises and precipitate the same upon the land of another. It has not collected the water upon its land and discharged the same in a large volume or by a rapid current upon appellant's land. It has raised its own premises so as to dike against and prevent the flow of surface water thereon. It has protected itself and prevented the invasion of its premises by the flood water of the stream. If thereby the water, which we hold to be surface water, is turned back and prevented from flowing over its land to appellant's injury, the case is one of *damnum absque injuria*. The surface water now meets the embankment and proceeds with the natural course of the stream. In other words, it is temporarily returned to the stream, and all the respondent has done is simply to protect its property from the overflow water which would otherwise leave the natural channel of the stream."

In this action, the surface water does not meet the embankment and then proceed with the natural course of the stream, but respondent has collected the water on its right of way and has discharged it upon appellants' land through a culvert constructed for that purpose. It has not raised its own premises for the sole purpose of diking against and preventing the flow of surface water thereon, but has also created a new, unnatural, and destructive current through its embankment, to appellants' damage. In the *Harvey* case, we observed that, as a result of the embankment there constructed, the surface water was returned to the stream; that all the defendant did was to protect its property from overflow water which would otherwise leave the natural channel of the stream. To construct the embankment and thereby raise the water to an unnatural height on respondent's right of way, and then force it through the culvert upon appellants' land with destructive force and in a larger volume than

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its natural flow, is not a protection of respondent's right of way from surface water, as held in the *Harvey* case; but is an attempt to control and dispose of the water in a manner to suit the respondent's pleasure and convenience without returning it to the stream and without regard to appellants' rights. A property owner cannot gather surface water on his land, discharge it in an unusual volume and with excessive force through an artificial ditch or culvert upon the land of another, and then be relieved from liability on the theory that the injury resulting to his neighbor is *damnum absque injuria*. Gould, Waters (3d ed.), 271; *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869; *Livingston v. McDonald*, 21 Iowa 160, 89 Am. Dec. 563.

"No one has a right to collect surface water in any considerable quantity upon his own premises, and then turn the same in a concentrated form upon the premises of his neighbor in such a manner as to cause him damage. Not that an owner of land may not so change the grade or surface thereof as to cause surface water to flow in a different direction from what it did before the natural contour thereof was changed, for this such owner doubtless may lawfully do, but he may not collect and concentrate such water by means of drains or otherwise, and then turn it upon his neighbor's land in a volume." *Johnson v. White*, 26 R. I. 207, 58 Atl. 658, 65 L. R. A. 250.

"It is held both in the jurisdictions which adopt the civil-law rule and in those following the common-law rule that the owner of land which surface water has reached has no right to collect it into a ditch, culvert, or other artificial channel and discharge it upon the land of another in quantity or volume exceeding what would have reached the latter land by natural drainage." 30 Am. & Eng. Ency. Law (2d ed.), 335, and cases cited in note 7.

In *Wood v. Tacoma*, 66 Wash. 266, 119 Pac. 859, we recognized the doctrine of the *Harvey* case, to the effect that surface water is to be regarded as an outlaw and common enemy against which every landed proprietor may protect himself without liability for injuries resulting to others; but

we also recognized the exception to the general rule substantially as above stated. The allegations of the complaint show that respondent has, in effect, gathered the surface water and discharged it through an artificial culvert on the appellants' land, with destructive force and in a concentrated volume, to their injury. This it cannot do without incurring liability for resulting damages.

The judgment is reversed, and the cause is remanded with instructions to overrule the demurrer.

PARKER, GOSE, and CHADWICK, JJ., concur.

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[No. 10193. Department Two. July 2, 1912.]

ADA STELLA JOHNSTON *et al.*, *Respondents*, v. SUPERIOR  
PORTLAND CEMENT COMPANY, *Appellant*.<sup>1</sup>

MASTER AND SERVANT—INJURIES—SAFE PLACE AND APPLIANCES—TUNNEL—AIR FAN—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The evidence is insufficient to sustain a verdict for the wrongful death of an employee, asphyxiated in a tunnel through the alleged insufficiency of the fan supplying fresh air to the workings, where it appears that the fan was under the control of the deceased, who understood it and turned it on or off as desired, that when his body was found, the fan was not working, and he either entered the tunnel in the morning without turning on the fan to clear out the foul air, or turned it off too soon, that the fan was in working order the night before and shortly after he was found, and if left running long enough, it furnished sufficient fresh air, no complaints of it having been made; and failure to use reasonable care is not shown merely by the evidence of a witness that sometimes the air was pretty bad and made him drowsy and weak in the knees, or by the fact that it took from half an hour to an hour and a half to clear out the air after shots.

FULLETON, J., dissents.

Appeal from a judgment of the superior court for Skagit county, Kellogg, J., entered October 25, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an

<sup>1</sup>Reported in 124 Pac. 1119.



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action for the wrongful death of an employee in a quarry.  
Reversed.

*Ira Bronson*, for appellant.

*J. L. Corrigan* and *M. P. Hurd*, for respondents.

MORRIS, J.—Respondents brought this action to recover damages for the death of Robert O. Johnston, husband and father of respondents, which death it is alleged was caused by the negligence of appellant while the deceased was employed in the construction of an upraise from the breast of a tunnel in appellant's quarry. Negligence was charged in several particulars, among which was that the work was unnecessarily hazardous, for the reason that the upraise was being extended upward from the breast of the tunnel instead of sinking a shaft from the surface downward; that the only means for providing the workings with a supply of pure air was an inadequate and improperly constructed fan, which was out of order at the time; and that the appellant, knowing these defects, directed the deceased, who did not apprehend the danger, to enter the workings, which were filled with noxious gases, causing his death. The appellant denied any negligence on its part, and alleged that the deceased met his death through his own negligence in failing to operate the fan, which was part of his duty; and also pleaded that the work in which deceased was engaged at the time of his death was being done by an independent contractor in whose employ the deceased was, and not in the employ of appellant. The trial resulted in verdict and judgment for respondents.

Appellant submits two contentions upon which it relies for a reversal: (1) That there was no proof of negligence; (2) that its defense that the work was being done by an independent contractor was so absolutely established as to leave no question of fact to submit to the jury, and that the court should have so held, as a matter of law, upon its mo-

tion for judgment. A careful reading of the record compels the conclusion that each of these contentions must be sustained.

The conceded cause of the death of deceased was asphyxiation, and the evidence upon which it is sought to establish negligence was directed against the fan employed to furnish the workings with sufficient pure air to make them reasonably safe. The tunnel from which the upraise was being extended was about seven feet high, and of equal width, and ran into the mountain side about two hundred feet. The upraise was about four and one-half feet by eight feet, and ran upward at an angle of forty-five degrees from the breast of the tunnel. At the time the deceased met his death, it had been extended about sixty feet. The fan was operated by an electric motor set in the rear end of the tunnel. It was about six feet high, four feet long, and one and one-half feet wide, and was located about twelve feet from the motor. There was a six-inch galvanized iron pipe running from the fan to the mouth of the tunnel, and another pipe running upward into the upraise, up to within a few feet of the bulkhead supporting the breast of the upraise. The fan was set in motion by the men themselves when they so desired, by throwing a switch; and when in motion, a stream of pure air was forced through the galvanized iron pipes against the breast of the upraise where the men were at work. The work was being done by drills, working under an air pressure of from ninety to one hundred pounds, which came through a compressor pipe to which the drills were connected by a hose. This air was controlled by a valve at the side of the drills. When the drills were not being used, the air was left on. The work was being done by a day and night shift of two men each.

The deceased, at the time of his death, was in charge of the day shift. When he went to work, he was instructed in the use of the fan, how to operate it by throwing the switch; and it is shown that he understood how to set the fan in

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motion, and had done so on previous occasions. There is no evidence that this method was inadequate to furnish the workings with sufficient pure air to make the place reasonably safe. It does not appear that any complaint was ever made, nor that there was any occasion when the supply of air was found insufficient, nor that the men ever found it necessary to quit work because of the insufficiency of the air supply. There is no evidence at all from which even an inference of these or kindred facts could be drawn. The only evidence attacking the plan of supplying air to the workings, or the adequacy of the method adopted, is that one witness says: "Once in a while they had pretty good air; sometimes it was pretty bad," and the witness had felt drowsy and weak in the knees. This witness was one of the night shift who left the workings just previous to the entry of the deceased on the day of his death. On that night he says he felt no bad effects from the air. Another witness says the fan was not installed in the usual way; that it blew in instead of sucking out, and that it did not draw out the smoke very well after blowing the holes, but it would if it ran long enough, and that it was generally let run until the smoke was cleaned out, which would be "possibly an hour, an hour and a half or half an hour." Then, in response to the question, "Would that clear the air out all right?" he answered: "I don't know really much about this place. I didn't work there very long. I didn't have much experience with it." He also adds that, no matter how long the fan ran, the air in the upraise was not as pure "as it was outdoors." Another witness, who found the deceased on the day of his death, says, at the time he "noticed something peculiar about the atmosphere in there," and detected gas, but that it was not very strong and he felt no "bad effects from it."

The deceased met his death on Wednesday morning, and an attempt is made to show the fan was out of repair by a witness who testifies that there was no change in the condi-

tions of the air pipes, nor the location of the fan between Wednesday and the following Monday, and that on Monday he "saw only one of the electric wires were cut and put down under the pipe and spliced, and the other was cut and had not been spliced, and the other was the same as when we left;" that the wire that was spliced was used to carry the current from the motor to the fan, and that "these changes made a difference in the way the fan was operated." It does not appear what "this difference" was; nor does this testimony in any way tend to show the fan was not in working order on Wednesday morning. In fact, the contrary appears. One of the witnesses who testified worked the night shift previous to the morning on which deceased came to his death. He does not testify that there was any trouble with the fan, nor that it was not in good working order. All he says is that, when he and Murray, who was in charge of the night shift, left the upraise after shooting fifteen holes, he asked Murray if he should turn on the fan, and Murray said no. The only evidence as to the condition of the fan on Wednesday morning is from one of the witnesses who went into the upraise to remove the deceased shortly after he was found; and within a half or three-quarters of an hour from that time, he started the fan and found the power on and the fan in working order. This evidence falls far short of supporting the allegation that the fan was inadequate for the purpose for which it was used, or that it was not in working order, or that its inefficiency or failure to work contributed to the death of deceased.

The men themselves operated the fan. No one had anything to do with turning it on or off except themselves. The night shift sometimes, after firing shots, turned on the fan to clear out the smoke and effects of the shots, when they left in the morning. The day shift, when they came to work, if they found it not running, turned it on if they so desired, and the deceased had been instructed how to do so and had done so. There can be no question but that he fully

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understood the operation of the fan. If, in the light of the evidence, a conjecture is to be made as to how or why death came to the deceased, no other inference can be drawn than that the air in the upraise was foul because of the fifteen shots fired by the night shift. They failed to turn on the fan and clear it out. When deceased and his helper came to work, they failed to turn on the fan, and went into the workings and were overcome by the foul air before they realized their danger. The negligence was that of the man in charge of the night shift, or of deceased himself. If it was that of the man in charge of the night shift, it could not be charged against the appellant. If appellant's theory is the true one, Murray, who was in charge of the night shift, was an independent contractor who had joined with another contractor, McInroy, in taking a contract from appellant for the construction of this upraise. McInroy, who was ordinarily in charge of the day shift, had gone to Seattle some days before and placed the deceased in charge of the day shift. Murray's negligence under these circumstances could not bind the appellant. If the work was not being done by an independent contractor, as respondents contend, then the negligence, whether it was chargeable to Murray or to the deceased or to both, could not bind the appellant. The record furnishes no way of escape from these conclusions, and the court below should have so ruled.

Respondents contend that any inference which may reasonably be drawn from proven or admitted facts is just as competent to establish negligence as the facts themselves. It may be admitted that such is a correct statement of the law. There is here, however, no fact from which an inference of negligence may be deduced. We must first have the fact established before we can draw an inference from that fact. The law does not impose upon those in charge of underground workings any other duty than ordinary prudence and reasonable safety. It is not required that the air therein shall be as pure at all times as it is on the surface; nor does

the fact that a workman has felt drowsy and weak in the knees prove the insufficiency of the air supply. Such may be the fact under conditions of ordinary prudence and reasonable safety. It may be assumed that in all such places, with the best possible conditions, the air will sometimes produce drowsiness and fall short of the purity of the surface air. To hold such evidence sufficient to establish negligence, is to create a standard impossible to comply with. It is not the test of reasonable safety required by the law. Nor does the fact that the fan required from one-half to an hour and a half to remove the bad effects of the shots establish negligence. If it proves that the fan worked slowly, then the men knew it and should have governed themselves accordingly. Negligence in such respects cannot be established by fixing a measure of time in which the fan must perform its work. The law knows no such measure. There is no evidence that this would be a longer time than should be required, even if there was. The necessary time was known and, if the men chose to enter the workings without giving the fan the required time to remove the bad air, they must accept the responsibility of such an act. There is not a syllable of testimony that the deceased, on the morning of his death, was directed to enter this tunnel upon any assurance of safety, or that any one attempted in any way or to any extent to influence his judgment as to whether or not it was safe to enter, or whether or not it was necessary or advisable to operate the fan. We simply know the fan was not working at the time the deceased was found, and that it would work when the switch was thrown shortly after he was found. Whether he entered the upraise without turning on the fan under the belief that Murray had cleaned it out, or did turn it on but had stopped it thinking it had run sufficiently long to clean out the upraise, cannot be determined. One or the other was the fact. In either case appellant cannot be charged with his act or his failure to act. These con-

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clusions seem to us irresistible, and we cannot escape them, much as we dislike to set aside a verdict in such a case.

Having reached this conclusion, it is not necessary to discuss the question of independent contractor, as what has been said establishes the error of the court in not granting the motion for judgment notwithstanding the verdict.

The judgment is reversed, and the cause remanded with instructions to dismiss.

MOUNT and ELLIS, JJ., concur.

FULLERTON, J., dissents.

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[No. 10252. Department Two. July 8, 1912.]

HILTA RINKER, *as Administratrix etc., Appellant*, v.

M. P. HURD, *as Administrator etc., Respondent*.<sup>1</sup>

ABATEMENT AND REVIVAL—ACTION FOR DEATH—ABATEMENT—DEATH OF WRONGDOER. Under Rem. & Bal. Code, § 183, providing that a cause of action for death by wrongful act or neglect of another may be maintained by heirs or personal representatives against the person causing the death, and Id., § 967, providing that all other causes of action by one person against another survive to the personal representatives of the former against the personal representatives of the latter, a cause of action for wrongful death survives only against the wrongdoer and abates upon his death.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered September 21, 1911, dismissing an action for wrongful death, upon sustaining a demurrer to the complaint. Affirmed.

G. D. Eveland, for appellant.

Thomas Smith, for respondent.

MOUNT, J.—In this case, the trial court sustained a demurrer to the complaint. The plaintiff elected not to plead further, and the action was dismissed. This appeal followed.

<sup>1</sup>Reported in 124 Pac. 687.

The complaint shows, that Otis N. Weeden wrongfully killed John R. Rinker; that shortly thereafter Otis N. Weeden died; that after his death, the administratrix of the estate of Rinker brought this action against the administrator of the estate of Weeden, to recover damages for the wrongful death of Rinker. The only question is whether the cause of action for the tort abated upon the death of the wrongdoer. The trial court held that the cause of action abated. Appellant argues that the cause of action survived to the personal representatives of Rinker and against the personal representatives of Weeden, under the provisions of Rem. & Bal. Code, § 967, which provides:

“All other causes of action [than those enumerated in section 183, *supra*] by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. Where the cause of action survives, as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued or, after his death, against his personal representatives.”

Section 183 referred to provides:

“When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death.”

It seems plain from this provision that the cause of action survives only against the person causing the death. It does not survive against his estate. Section 967 relied upon by the appellant refers to “*all other causes of action*,” excepting from its terms causes referred to in § 183, of which this is one. This question was decided in *Jones v. Miller*, 35 Wash. 499, 77 Pac. 811, where we said, referring to § 967, *supra*:

“When we read this section as if it stood alone, and apart from its context, it doubtless bears the construction put upon it, but we held in *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948, that it had no such



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meaning. There we said that the legislature, when it enacted this section, was legislating with reference to causes of action which had already survived, and was not attempting to announce what causes of action should survive; and, further, that if the contrary contention were correct, there was no limit whatever to causes which would survive the death of the person injured; 'for causes of action for assault, slander, and for other purely personal causes, would survive; and this would be so wide a departure from the established rule that the legislature would hardly be deemed to have intended it without plainly expressing such intention.' That this is the correct construction of the statute is made clear by reading it in connection with the act of which it formed a part when originally enacted, and being so, it does not warrant the holding that causes of action, such as the one at bar, survive to heirs and personal representatives."

This is decisive of the question, and we deem it unnecessary to notice cases upon this point in other jurisdictions. The court therefore properly sustained the demurrer.

The judgment is affirmed.

FULLERTON, MORRIS, ELLIS, and CROW, JJ., concur.

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[No. 9941. Department One. July 8, 1912.]

M. GARVEY, *Plaintiff*, v. ERIC SKAMSER, *Appellant*,

THOMAS B. FORSYTH, *Respondent*.<sup>1</sup>

**VENUE—CHANGE—BIAS OF JUDGE—APPLICATION—EFFECT—JURISDICTION.** An application to transfer a cause to another judge upon an affidavit of prejudice, divests the first judge of jurisdiction to try the case on the merits, if the application is timely made.

**JUDGMENTS—VACATION—NOTICE.** An order transferring the cause to another judge, upon an affidavit of prejudice, can only be vacated for fraud in procuring it, after a hearing and the notice required by Rem. & Bal. Code, §§ 242, 244.

**VENUE—BIAS OF JUDGE—AFFIDAVIT OF PREJUDICE—SUFFICIENCY.** An affidavit of prejudice stating that affiant "believes" the judge is prejudiced instead of stating that he "is prejudiced," as re-

<sup>1</sup>Reported in 124 Pac. 688.

quired by statute, is sufficient where the statute gives a change of judges where the party or his attorney, "cannot, or believes that he cannot, have a fair and impartial trial."

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered September 9, 1911, dismissing a petition to vacate a judgment. Reversed.

*W. B. Osbourn*, for appellant.

*Garvey, Kelly & MacMahon*, for respondent.

Gose, J.—This is an appeal from an order denying a petition to vacate a judgment and decree of foreclosure. The essential facts, as disclosed by the record, are as follows: The plaintiff, Garvey, commenced an action in the superior court of Pierce county for the foreclosure of a certificate of delinquency. The respondent, Forsyth, filed an answer and cross-complaint. By the cross-complaint, he sought to foreclose a mortgage, executed by the appellant, Skamser, upon the property covered by the certificate of delinquency. On June 19, 1911, a decree was entered on the cross-complaint, foreclosing the respondent's mortgage. The decree recites that the appellant, pending the tax foreclosure proceedings, paid the taxes, interest, and costs to the county treasurer of Pierce county. On July 19, 1911, the appellant, the owner of the mortgaged property, filed a petition for the vacation of the foreclosure decree. The substance of the petition is, that, pending the tax foreclosure proceeding, he paid and satisfied the tax lien in full; that he relied upon the promise of the respondent that he would dismiss the cross-bill, and did not answer, and in effect that the decree was obtained by overreaching and fraud.

On the last named date, an order was made by Judge Easterday, one of the superior court judges of Pierce county, setting the petition for hearing on the 14th day of August. On the latter date, the hearing on the petition was continued until the 4th day of September, by Judge Card. On Septem-

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ber 2, by "consent of counsel," the hearing was continued to September 9, 1911, at two o'clock p. m. On September 9, counsel for the appellant filed the statutory motion and affidavit for a transfer of the cause from the department presided over by Judge Clifford to some other department of the superior court. The affidavit made by the appellant's counsel states, "that this affiant believes that the said Judge Clifford is prejudiced against this affiant, and by reason thereof believes that he cannot have a fair and impartial trial before said judge, and requests that the said cause be transferred to another department of said court." On the same day, the following transfer order was entered:

"Upon reading the affidavit of W. B. Osbourn filed herein, and upon motion of attorney for defendant, Eric Skamser, it is ordered that this proceeding be and the same is hereby transferred to Department No. 3 of said court. And the said proceeding is hereby ordered continued pending the order of the judge of said department. Dated this 9th day of September, 1911. M. L. Clifford, Judge."

Thereafter, and upon the same day, an order was entered by Judge Clifford, dismissing the petition to vacate the judgment and decree. This is the order sought to be reviewed by the appeal.

The last order recites, that the transfer order was entered upon the representation of counsel for the appellant that the attorneys for the respondent consented to the order of transfer; that the order was signed in reliance upon that representation; that later in the day the respondent's attorneys appeared and informed the court that they had not consented to the order; that thereupon the court instructed the attorneys for the respondent that, if they could notify the attorneys for the appellant "in any way," the court would "hear and determine the petition at two o'clock, p. m.;" that they did so notify the appellant, "and through him his attorneys;" that in fact the attorneys knew respondent had not consented to the order of transfer; that the order was "obtained by fraud and was sought for delay only,

and is void and has been vacated;" that there was no appearance for the appellant; that the court, having considered the affidavit for transfer, and having considered the petition and the answer tendered therewith and the affidavits presented on behalf of the respondent, determined that the petition should be dismissed.

This is certainly a novel order. After the order was entered transferring the hearing to another department, the judge who made the order had no jurisdiction to hear the petition on the merits. Laws 1911, page 617; *State ex rel. Nelson v. Yakey*, 64 Wash. 511, 117 Pac. 265. On the presentation of the motion and affidavit, it was the imperative duty of the judge to transfer the case to another department. His duty to do so depended upon the statute, and not upon the consent of opposing counsel. He could only deny the application on the ground that it was not timely. *State ex rel. Jones v. Gay*, 65 Wash. 629, 118 Pac. 830; *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 118 Pac. 40.

If, however, the order was obtained by fraudulent statements, it could only be vacated after a hearing had upon the statutory notice. Rem. & Bal. Code, §§ 242, 244. This notice was not given. It would be a reproach to the law to permit an officer of the court to be convicted of a fraud, and to have the consequences of the fraud visited upon the client, upon an *ex parte* hearing. The facts which were thought to constitute the fraud do not appear of record, but only by the affidavit of counsel. The appellant had a right to the statutory notice and to a day in court to meet the charges. This has been denied him.

The respondent argues that the affidavit is insufficient in that it avers that the affiant "believes" the judge to be prejudiced, whereas it should state that he "is prejudiced." The purpose of the statute is to give a change of judges upon a timely application where "the party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge." The affidavit is sufficient.

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It is further argued that the matter of the vacation of the judgment is within the discretion of the trial court, and that the petition must be pressed with diligence. These questions are not before us. The appellant complains because he has not had a hearing on his petition. It was timely filed, and he is entitled to a hearing.

The judgment is reversed, with directions to proceed in conformity with this opinion.

CHADWICK, CROW, and PARKER, JJ., concur.

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[No. 10123. Department One. July 8, 1912.]

GOODALE PHONOGRAPH COMPANY, *Appellant*, v.  
F. E. VALENTINE *et al.*, *Respondents*.<sup>1</sup>

RECEIVERS—ACTIONS—CONDITIONS PRECEDENT—LEAVE TO SUE—WAIVER. The objection that leave of court to sue a receiver was not first obtained is waived if not raised by the receiver upon filing a general appearance, and cannot thereafter be raised by other parties.

CORPORATIONS — ACTIONS—CONDITION PRECEDENT—PLEADING. A complaint by a corporation need not allege that the action was authorized by its board of directors, since it will be presumed until the contrary appears.

JUDGMENT — RES JUDICATA—COLLUSIVE ACTION—MATTERS AND PARTIES CONCLUDED. The denial of a motion to vacate the appointment of a receiver of a corporation, entered in a collusive suit through *ex parte* proceedings, is not *res judicata* or a bar to a subsequent suit by the corporation to vacate the receivership and set aside the sales made therein.

CORPORATIONS—RECEIVERS—VACATION—GROUNDS —PLEADING—COMPLAINT. A complaint by a corporation to vacate a receivership and set aside sales made by the receiver states a cause of action, where it appears that the assets of the corporation were of the value of \$5,000,000, its indebtedness inconsequential, that the defendants owned \$1,500,000 of the capital stock, on which they had paid only \$1,800, and were solvent, and that they prosecuted a collusive suit for the appointment of a receiver and secured a sale of all the

<sup>1</sup>Reported in 124 Pac. 691.

assets for \$500, all the proceedings being *ex parte* and while the president and secretary of the company were absent from the state on the business of the company.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 14, 1911, dismissing an action in equity, upon sustaining demurrers to the complaint. Reversed.

*John E. Humphries*, for appellant.

*A. H. Garretson* and *Johnston & McMenamin*, for respondents.

Gose, J.—This is a bill in equity to vacate an order appointing a receiver, and to set aside certain sales made through him. The court sustained demurrers to the complaint, and dismissed the action. Plaintiff prosecutes the appeal.

The complaint is of too great length to be set forth in full. It alleges, however, in substance, that the plaintiff is a corporation organized under the laws of this state, with its principal place of business in the city of Tacoma; that it has paid its last annual license fee; that its property and assets are of the value of \$5,000,000; that F. C. Goodale is its president and general manager, and owns a majority of its capital stock, to wit, \$3,000,000; that Pearl V. Goodale is its secretary and treasurer, and owns \$100,000 of its capital stock; that the respondent Garretson, his wife, and one Coombs are the owners of \$1,000,000 of its capital stock upon which \$700 has been paid; that the respondent Shreeder is the owner of \$500,000 of its capital stock, upon which there has been paid only \$1,100; that the respondent Garretson and his wife, and Coombs and the respondent Shreeder are solvent; that the respondent Garretson was plaintiff's vice president and regularly employed attorney; that the respondent Swindells was and is the attorney for the respondent Shreeder; that the respondents, with intent to cheat and defraud the appellant out of its property and assets, and to

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destroy the value of its stock, conspired and confederated together and caused a collusive suit to be brought against the appellant by the respondent Valentine, in the superior court of Pierce county; that the respondents Garretson and Swindells handled "both sides of the case;" that they caused the respondent Swindells to be appointed receiver of the property of the corporation by falsely alleging that the appellant was insolvent, and that the president and secretary had left the country and taken the books and papers of the appellant with them, when in fact the appellant was not indebted other than for the traveling expenses of its president and secretary. It is further alleged that the president and secretary, with the knowledge and consent of the respondents, were temporarily absent from the state in the interest of the appellant's business; that the respondents procured an order of court permitting a sale of the property, and that the property and assets of the appellant were sold to respondent Shreeder for the sum of \$500; "that all of the orders were *ex parte*, and there was no appearance of any kind or description for the plaintiff . . . and no answer at the time said orders were made had been filed or served . . . and all of said orders were made and secured without any knowledge on the part of the plaintiff or of the president, secretary, treasurer, or general manager." The respondent Garretson demurred upon four grounds as follows:

"(1) That plaintiff has no legal capacity to sue.

"(2) That the plaintiff in its complaint does not state facts sufficient to constitute a cause of action against defendant.

"(3) That there is a defect of parties both plaintiff and defendants.

"(4) That there is another cause pending in the same court between the same parties, involving the same issue."

The respondents Shreeder and Valentine severally demurred, on the ground that the appellant has no legal capacity to sue. The respondent Swindells, the receiver, appeared generally and moved to strike certain interrogatories

and certain allegations of the complaint. The order is that the several demurrers be and are sustained, "on the ground that plaintiff has no legal capacity to sue, and that the complaint does not state facts sufficient to constitute a cause of action," and that the action be dismissed.

The contention of the respondents, that the failure to allege that leave had been obtained to sue the receiver is jurisdictional, is without merit. *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429. That case holds that the failure to obtain leave to sue a receiver is an "irregularity which can only be taken advantage of by a stay of proceedings or by proceedings as for a contempt." The receiver having appeared generally, and not having raised the question, will be held to have waived it, and the question does not concern the other respondents. *Manker v. Phoenix Loan Ass'n of St. Joseph*, 124 Iowa 341, 100 N. W. 38.

It is next urged that the action cannot be prosecuted because it was not authorized by a majority of the trustees. It suffices to say that a corporation has the power to sue and defend, and it is not necessary to allege in the complaint that the commencement of the action was authorized by the board of directors. This will be presumed until the contrary appears.

It is next argued that the issue tendered by the complaint is *res judicata*. The only basis for the contention, as shown by the records here, is that, in the original suit wherein the receiver was appointed, the court, before the entry of the judgment in this case, entered an order denying the defendants' motion to vacate the order appointing the receiver, and denying its motion to discharge him. Before the entry of the order in this case, the two cases were consolidated. We do not think the record here is *res judicata*, even as to the receiver; and it can hardly be contended that, upon its face, it adjudicated any rights as between the appellants and the other respondents. If it should be determined upon proper pleadings and proof that the order was entered upon motion



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of the appellant acting through its present counsel, and not upon a collusive motion in the original case, a serious question would be presented which we are not now called upon to decide.

Passing to the merits of the question, it clearly appears from the averments in the complaint, that the assets of the appellant were of the value of \$5,000,000; that its indebtedness was inconsequential; that the respondents owned about \$1,500,000 of the capital stock upon which they had paid only \$1,800; that they were solvent; that they prosecuted a collusive suit and secured the appointment of the receiver and a sale of the assets of the appellant for \$500. Moreover, it is alleged that one of the respondents was the appellant's vice-president and regularly retained attorney; that all the orders were *ex parte* and that the appellant was not represented in court. If these facts are true, the grossest fraud was perpetrated upon the court, and the assets of the corporation have been fraudulently diverted into the hands of one of the respondents, a stockholder in the corporation, through the combined fraud of the respondents. It is the especial duty of a court of equity to see that such wrongs are promptly redressed. A party to a fraudulent proceeding in court will not be permitted to retain the fruits of his wrongful acts, for fraud committed in court is just as odious as fraud committed out of court.

We think the complaint states a cause of action. The judgment is reversed.

CHADWICK, CROW, and PARKER, JJ., concur.

[No. 10152. Department Two. July 8, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. OSCAR COLLINS,  
*Respondent*.<sup>1</sup>

**ELECTIONS—OFFENSES—FRAUDULENT REGISTRATION—FALSE OATH—**Loss of "CIVIL RIGHTS." The registration oath, required by Rem. & Bal. Code, § 4768, that the elector had not lost his civil rights by having been convicted of an infamous crime, is not shown to be false by an allegation in an information for false swearing that the accused had taken the oath after conviction of a felony, where, by such conviction, he had lost no civil rights, but only the right to vote, which is a political and not a civil right.

**SAME—STATUTES CONSTRUED.** Const., art. 6, § 3, providing that persons convicted of infamous crimes shall be excluded from the elective franchise unless restored to their civil rights, cannot be taken as a construction of the existing territorial statute (Rem. & Bal. Code, § 4755), to mean that such persons lost their civil rights, when the act only forfeited their right to vote, a political and not a civil right.

**SAME—INFAMOUS CHARGE—JAIL BREAKING.** An information for falsely swearing, in a registration oath made pursuant to Rem. & Bal. Code, § 4768, that the accused had not lost his civil rights, by being convicted of an infamous crime, is insufficient where it merely alleges that the accused had been convicted of the infamous crime of jail breaking in another state without showing that at the time of his escape he was held on an infamous charge; since by Rem. & Bal. Code, § 2342, jail breaking is a felony only where the prisoner was held on a felony charge, and a misdemeanor if held otherwise.

**STATUTES—CONFLICT OF LAWS—EXTRATERRITORIAL FORCE OF FOREIGN LAWS.** Where, under the law of this state, jail breaking was only a misdemeanor at the time the offense was committed in another state, the offense would not be an infamous crime, within the meaning of Rem. & Bal. Code, § 4768, denying the elective franchise to certain citizens, even if jail breaking were a felony in such other state; since the laws of such state could not be given extraterritorial force in opposition to the laws of this state.

**STATUTES—FOREIGN LAWS—PLEADING AND PROOF.** The laws of another state must be pleaded and proved.

<sup>1</sup>Reported in 124 Pac. 903.

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Appeal from a judgment of the superior court for King county, Gay, J., entered December 23, 1911, dismissing a prosecution for fraudulent registration, upon sustaining a demurrer to the information. Affirmed.

*John F. Murphy, Hugh M. Caldwell, and H. B. Butler,*  
for appellant.

*Gill, Hoyt & Frye,* for respondent.

ELLIS, J.—Appeal from an order sustaining a demurrer to an information charging the defendant with the offense of fraudulent registration.

The information charged that the defendant in making the oath provided by law for the registration of voters, did

“ . . . in such oath or affirmation wilfully, falsely, feloniously and contrary to his oath, swear or affirm that he had not lost his civil rights by being convicted of an infamous crime.

“Whereas said Oscar Collins had, as he then and there well knew, theretofore been convicted in the circuit court of the state of Missouri, at the term of said court being then and there held in the month of November, A. D. 1889, in Jackson county, in said state of Missouri, of the infamous crime of breaking jail before conviction, and been sentenced by said court to serve a term of two years from November 18, 1889, in the Missouri state penitentiary, and had on the 26th day of November, 1889, entered said penitentiary and had thereafter served his said term in the said penitentiary, under the law of the state of Missouri, providing that:

“‘If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months,’ each and all of which facts as aforesaid were well known to said Oscar Collins when he falsely and fraudulently registered in King county, state of Washington, on the 7th

day of January, 1911, for the purpose of voting as hereinbefore charged."

The defendant demurred upon the grounds: "First, that the facts in said information set forth do not constitute a crime; second, that said information does not substantially conform to the Code of Washington." From an order sustaining the demurrer, the state has appealed.

The registration statute, Rem. & Bal. Code, § 4768, prescribed a form of oath or affirmation as follows:

"I, ———, do solemnly swear or affirm that I am a male person over twenty years, eleven months and ten days of age, that I am a native born or naturalized citizen of the United States, or was a legal elector of the territory of Washington at the time of the adoption of the constitution of the state of Washington; that I have been an actual permanent resident of the state of Washington for eleven months and ten days last past, of the county of ——— for seventy days last past and of the ——— precinct ten days last past, and I have not lost my civil rights by being convicted of an infamous crime; that I was either a qualified elector on the first day of July, 1901, or that I can read and speak the English language."

The state constitution, art. 6, § 3, reads:

"All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise."

The territorial law of 1866 (Rem. & Bal. Code, § 4755), which was in force when the constitution was adopted, provides that, "No idiot, or insane person, or persons convicted of an infamous crime, shall be entitled to the privilege of an elector."

It will be noted that the provision of the constitution above quoted is practically the same as this statute with the exception of the inserted words, "unless restored to their civil rights." From that circumstance, it is argued that the constitution makers had in mind the prior statute, and construed it as meaning that, by the conviction, such persons lost their

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civil rights. But the only right declared forfeited by either the statutory or constitutional provision is the right to exercise the elective franchise. This is not a civil right, but a political right. Bouvier's Law Dictionary, vol. 2, p. 929, defines civil and political rights as follows:

*"Civil rights* are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like."

*"Political rights* consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses."

It would seem that the forfeiture of civil rights generally could hardly be based upon an implication which can arise only by assuming a misconception by the framers of the constitution of the nature of the right declared forfeited by the prior statute. That right is a political right, and was obviously the only right had in mind by the makers of the constitution. Unless we judicially amend the constitution and also the form of oath prescribed in the registration law, by substituting "political rights" for "civil rights," it seems plain that the information does not charge false swearing, since the defendant had lost no civil rights by the conviction set out in the information.

But counsel for the state argues, in substance, that art. 6, § 3 of the constitution, in order to give effect to all of its terms, must be construed as defining the right to vote as a civil right. We find it unnecessary to pass upon this contention, since, even assuming that the right of franchise may be held to be defined by the constitution as a civil right regardless of the accepted definition of that term, still the information is fatally defective.

Section 2342 of Rem. & Bal. Code, which was enacted in 1909, reads:

“Every prisoner confined in a prison, or being in the lawful custody of an officer or other person, who shall escape or attempt to escape from such prison or custody, by force or fraud, if he is held on a charge, conviction or sentence of a felony, shall be guilty of a felony; if held on a charge, conviction or sentence of a gross misdemeanor or misdemeanor, he shall be guilty of a misdemeanor.”

Under this section, it is plain that the escape or attempted escape, in order to constitute a felony, must be by a prisoner charged with a felony, otherwise it is merely a misdemeanor. The information is silent as to the nature of the offense with which the defendant was charged when he broke the Missouri jail. It does not state whether he was then charged with a felony or a misdemeanor under the laws either of that state or of this. It is clear that the information thus failed to state facts which under the present law of this state would necessarily constitute an infamous crime. Moreover, prior to the enactment in 1909 of § 2342, above quoted, the breaking of jail and escape therefrom by a prisoner, regardless of the nature of the charge upon which he was imprisoned, was only a misdemeanor. Code of 1881, § 884. So that, under the law of this state, as it existed when the defendant was convicted in Missouri, as alleged in the information, the offense for which he was convicted was recognized only as a misdemeanor. In order, therefore, to sustain this information, we are driven to the unreasonable position that the defendant, at the time alleged in the information, might have broken jail in this state without loss of his right to vote, but having broken jail in Missouri and lost his right to vote there (assuming that he did lose this right) he therefore lost his right to vote on subsequently becoming a resident of this state. In other words, the same offense committed in this state, being here a misdemeanor not forfeiting the right of franchise, if committed in a state where it is a felony would forfeit the right of franchise here. We have been cited to no authority according such an extraterritorial effect to a foreign law in order to sustain a criminal charge under a do-

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mestic statute. While we do not hold that the forfeiture of the elective franchise declared by the constitution applies only to persons convicted of an infamous crime within this state, we do hold that persons who come into this state and become citizens thereof are subject to the same criminal laws as are other citizens.

Again, in order to sustain this information we must also make the assumption that, under the Missouri law, the appellant by the conviction pleaded had lost his right to vote in that state, though no statute of that state to that effect is pleaded in the information. It is elementary that, even in civil cases where a foreign law is an essential element to the cause of action or defense it must be pleaded and proved like any other fact. 9 Ency. Plead. & Prac., p. 542.

The demurrer was properly sustained. The judgment is affirmed.

MORRIS and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

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[No. 10267. Department Two. July 9, 1912.]

THE STATE OF WASHINGTON, *Respondent*. v.

JOHN C. KINCAID, *Appellant*.<sup>1</sup>

CRIMINAL LAW—VENUE—EVIDENCE—JUDICIAL NOTICE. The venue of an offense is sufficiently established in Whatcom county, where laid, by proof that it was committed in the city of Bellingham, as the courts will take judicial notice that Bellingham is in Whatcom county.

RAPE—EVIDENCE—SUFFICIENCY. Under Rem. & Bal. Code, §2437, providing that sexual penetration, however slight, is sufficient to complete sexual intercourse, evidence of repeated attempts by the accused and pain suffered by a child of twelve, is sufficient to make a case for the jury upon the question of consummation of a statutory rape.

<sup>1</sup>Reported in 124 Pac. 684.

**NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.**  
A new trial for newly discovered evidence is properly refused where the new evidence is merely impeaching and could or should have had but small probative value, and should not have changed the result.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered December 30, 1911, upon a trial and conviction of rape. Affirmed.

*Henry C. Beach* and *George Livesey*, for appellant.

*Frank W. Bixby* and *H. C. Thompson*, for respondent.

ELLIS, J.—The defendant was found guilty by a jury of the crime of statutory rape, committed upon the person of a twelve-year-old girl. A motion and supplemental motion for a new trial were overruled by the court. From a judgment of conviction and sentence to imprisonment in the penitentiary, the defendant has appealed.

The appellant's first contention is that the state failed to prove venue, as laid in the information. There was no direct statement by any witness that the crime was committed in Whatcom county. The rule, however, is established by overwhelming authority that venue, like any other fact, may be found upon circumstantial evidence; and that, where it may be reasonably inferred from the evidence that the crime was committed in the county designated in the information, the venue is sufficiently established.

"The venue need not be proved by direct and positive evidence. It is sufficient if it may be reasonably inferred from the facts and circumstances which are proven and are involved in the criminal transaction. It is enough if it may be inferred from the circumstances by the jury that the crime was committed in the county alleged in the indictment. The venue need not be proved beyond a reasonable doubt. If the only rational conclusion from the facts in evidence is that the crime was committed in the county alleged, the proof is sufficient. The venue may be proved by circumstantial evidence. It is not necessary that a witness expressly testifies that the crime was committed in the county as charged in the



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indictment. Such direct and positive testimony may be dispensed with. For it has been repeatedly held where there is no direct testimony showing the venue that if there are references in the evidence to streets, public buildings or other landmarks at or near the scene of the crime, which are either known to the members of the jury or which may probably be familiar to them, the jury may safely presume that the venue has been proved." Underwood, Criminal Evidence (2d ed.), pp. 59, 60, 61, § 36.

See, also, 13 Ency. Evidence, p. 932; 12 Cyc. pp. 494-495; *Wilson v. State*, 62 Ark. 497, 36 S. W. 842, 54 Am. St. 303; *McCune v. State*, 42 Fla. 192, 27 South. 867, 89 Am. St. 225; *People v. McGregor*, 88 Cal. 140, 26 Pac. 97; *State v. Burns*, 48 Mo. 438; *State v. Ruth*, 14 Mo. App. 226; *Commonwealth v. Ackland*, 107 Mass. 211; *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *Cox v. State*, 28 Tex. App. 92, 12 S. W. 493; *State v. Grear*, 29 Minn. 221, 13 N. W. 140; *State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *State v. Meyer*, 135 Iowa 507, 113 N. W. 322, 124 Am. St. 291; *Brooke v. People*, 23 Colo. 375, 48 Pac. 502; *State v. Thomas*, 58 Kan. 805, 51 Pac. 228; *State v. Gilluly*, 50 Wash. 1, 96 Pac. 512; *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810.

The prosecuting witness testified that the appellant conducted a photographic studio "over the Empire Market, on Holly street"; that the prosecuting witness lived in Bellingham, on Forrest street; that while living there she went to Sunday school on Holly street; that she went to appellant's studio sometimes every day, and sometimes less frequently; that he often gave her money, and that he was the only person in the city of Bellingham who would give her money with which to go to shows; that the offense was committed in the appellant's studio on one of these visits. The chief of police testified that he was chief of police of the city of Bellingham; that he went up to the photographic gallery of the appellant and discovered him in a compromising position with the prosecuting witness. Many other circumstances tending to show that the whole transaction occurred in the city of Bell-

ingham also appear in the evidence. This court will take judicial notice of the fact that the city of Bellingham is in Whatcom county. Under the rule announced in the foregoing authorities, the venue as laid in the information was fully established.

It is next urged that the consummation of the crime was not established, in that there was no proof of actual penetration. The statute declares that:

"Any sexual penetration, however slight, is sufficient to complete sexual intercourse or carnal knowledge." Rem. & Bal. Code, § 2437.

"Penetration may be proved by direct or circumstantial evidence like any other fact." 10 Ency. Evidence, p. 581.

We will not review the revolting details of the evidence on this point, further than to say that the testimony of the prosecuting witness and another little girl who was present on several occasions, if believed by the jury, was ample to show that the appellant repeatedly and persistently attempted to commit the offense charged, and that he expressed the intention to commit it. The prosecuting witness testified: "The last time I think he did do something the last time, but I do not know. He hurt me a little, quite a little, the last time." The repeated efforts of the appellant and the pain of the prosecuting witness, if the jury believed the testimony, were facts from which penetration to some extent would almost necessarily be inferred. The question was one for the jury. There was competent evidence to the point. We cannot disturb the verdict on the ground urged without usurping the functions of the jury. *People v. Courier*, 79 Mich. 366, 44 N. W. 571.

Finally, it is contended that a new trial should have been granted on the ground of newly discovered evidence. The principal corroborating witness had testified that she, also, had had intercourse with other men. The affidavits in support of the motion for a new trial show that the complaining witness and the other little girl, the principal corroborating

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witness, had been subjected to a physical examination by the county physician. An affidavit of the physician states that there was no physical evidence of violation of the other child, and that the undilated condition of the sexual organs of the prosecuting witness would negative the assumption that connection had occurred with any adult male person. On request of the court, he made a supplemental and explanatory affidavit, stating that, by the word "connection," used in the original affidavit, he meant "complete insertion;" but that, if the term penetration as used in the statute meant entering the *labia* only, then such penetration was possible. It is manifest that this newly discovered evidence had but small probative value, and would not, or at least should not, have changed the result of the trial. It was at most merely impeaching in its character.

"The absent evidence for which a new trial is asked, or the evidence which it is proposed to offer on a new trial to overcome the effect of evidence by which the movant was surprised, must be of such character and importance as will probably result in a different verdict. Ordinarily a new trial will be refused when the proposed new evidence is merely cumulative of evidence actually introduced by the movant on the trial, or is merely impeaching in its character." 29 Cyc. pp. 880, 881.

We are unable to say that there was any abuse of discretion in the denial of a new trial.

The judgment is affirmed.

MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 10464. Department Two. July 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Sophia Bremer, Plaintiff*, v. THE SUPERIOR COURT FOR KITSAP COUNTY *et al., Respondents*.<sup>1</sup>

EMINENT DOMAIN—RAILROADS—POWER TO CONDEMN—PUBLIC SERVICE—EXTENT—GOOD FAITH. A railway terminal company organized primarily to connect business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries operated by the company and reaching various cities, and to carry freight in car load lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by the expenditure of money for the acquisition of like terminals in another city.

Certiorari to review an order of the superior court for Kitsap county, Bell, J., entered April 16, 1912, adjudging a public use in condemnation proceedings. Affirmed.

*Hughes, McMicken, Dovell & Ramsey*, for relator.

*F. M. Dudley*, for respondents.

MORRIS, J.—Upon application of relatrix, we granted a writ of certiorari to review orders of the lower court in proceedings in which the Milwaukee Terminal Railway Company, one of the respondents herein, was seeking to condemn lands of relatrix at Bremerton, for railway purposes. A return has been made to the writ, and the matter is now before us for final adjudication.

The only ground of attack upon the right of the terminal company to condemn is that it is not a railway company in contemplation of law, and is, therefore, not entitled to exercise the right of eminent domain, and that the lands it seeks to appropriate are not to be used for railway purposes. The terminal company has been duly organized, and no question is made as to its right to exercise the power of eminent domain for the purposes of its organization, except as above

<sup>1</sup>Reported in 124 Pac. 1135.

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stated. It appears from the return that the company has located a line of tracks, some 1,100 feet in length, in the city of Bremerton, extending from deep water to points where it can serve various industries located at Bremerton, including the United States navy yard. At deep water, these tracks are intended to connect with car ferries operated by the company and reaching various cities on Puget Sound. The purpose of the railway tracks to be constructed upon the land sought to be appropriated is given as "affording access to and egress from business houses and industries conducted and carried on in said town of Bremerton, and to use said track for the switching, transfer, and delivery of empty cars and freight destined to and from said town of Bremerton, and as a means of transporting freight and passengers to and from said point and to and from the terminal grounds, docks, warehouses, and stations of this and other transportation companies in the county of Kitsap and elsewhere, in carrying on its said business as a common carrier." It will thus be seen that we have here presented the identical question submitted to this court in *State ex rel. Milwaukee Terminal R. Co. v. Superior Court*, 54 Wash. 365, 103 Pac. 469, 104 Pac. 175, in which this company sought to appropriate lands at Ballard for a like purpose, and the right was sustained. Upon the determinative facts, the two cases cannot be distinguished, and the rule there announced must control our decision here. For this reason, it would serve no good purpose to extend the discussion beyond what is there said. That conclusion was reached upon a full consideration of the arguments now presented by relatrix, and will stand as the rule of this court in cases of like character.

In addition to the authorities cited in the *Milwaukee Terminal Co.* case, the rule there announced finds support in *State ex rel. McIntosh v. Superior Court*, 56 Wash. 214, 105 Pac. 637; *Caretta R. Co. v. Virginia-Pocahontas Coal Co.*, 68 W. Va. 185, 57 S. E. 401; *Madera R. Co. v. Raymond Granite Co.*, 3 Cal. App. 668, 87 Pac. 27; *State ex rel. Ham-*

*mer v. Wiggins Ferry Co.*, 208 Mo. 622, 106 S. W. 1005; *Bridal Veil Lumbering Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790, 60 Am. St. 818, 34 L. R. A. 368; 1 Lewis, Eminent Domain (3d ed.), § 263.

The orders complained of are in all things sustained, and the judgment of the lower court affirmed.

MOUNT, FULLERTON, ELLIS, and CROW, JJ., concur.

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[No. 9983. Department One. July 9, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Stephen A. Gibson, Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.<sup>1</sup>

**DIVORCE—APPEAL—EFFECT—STAY—GARNISHMENT AFTER APPEAL.**  
Upon appeal from a judgment of divorce, disposing of the property rights of the parties, the superior court loses all jurisdiction and cannot issue a writ of garnishment to enforce the judgment for costs and attorney's fees against the husband, although he failed to file any supersedeas bond on his appeal; in view of Rem. & Bal. Code, § 996, providing that on appeal in a divorce case, the supreme court shall be possessed of the whole case as fully as the superior court was.

Certiorari to review an order of the superior court for Spokane county, Webster, J., entered September 22, 1911, for the issuance of a writ of garnishment. Reversed.

*R. L. Edmiston* and *A. M. Craven*, for relator.

*Belt & Powell*, for respondent.

**PER CURIAM.**—Certiorari to review the action of the superior court of Spokane county in issuing the writ of garnishment against Montana Scotch Bonnet Copper & Gold Mining Company, a corporation, upon the complaint of Marie M. T. Gibson. The material facts are undisputed. The original action ancillary to which the writ of garnish-

<sup>1</sup>Reported in 124 Pac. 686.

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ment was issued was a suit for divorce, by Stephen A. Gibson, relator herein, as plaintiff, against Marie M. T. Gibson, as defendant, consolidated with another action between the same parties and the mining company as an additional defendant, for the recovery of certain certificates of mining stock issued by the mining company and held by the defendant Marie M. T. Gibson. The decree in the consolidated actions dissolved the marriage relation, and required the defendant Marie M. T. Gibson to indorse and deliver the stock certificates to the plaintiff. In denying the motion for a new trial on May 31, 1911, the court modified the decree and gave the defendant judgment for \$198 costs, and an attorney's fee of \$500.

The defendant Marie M. T. Gibson appealed from the decree in the consolidated actions, the notice reciting that the appeal was from the decree and every part thereof adverse to her. On June 2, 1911, she filed an appeal and supersedeas bond in the amount fixed by the court, properly executed and conditioned. On August 17, 1911, the plaintiff, Stephen A. Gibson, gave notice of a cross-appeal from the judgment for \$698, costs and attorney's fee, and on the same day filed his appeal bond. On September 11, 1911, Marie M. T. Gibson instituted garnishment proceedings against the mining company as garnishee defendant, to subject stock in that company owned by Stephen A. Gibson to the judgment in her favor for \$698 rendered in the consolidated action. The affidavit for garnishment was served upon the garnishee defendant on September 12, 1911. The garnishee defendant answered, admitting that, at the time of the service of the writ, the books of the company showed that Stephen A. Gibson was the owner of 294,000 shares of the capital stock of the company. On September 22, 1911, the court entered an order directing the sheriff to sell the mining stock, or so much as necessary, to satisfy the judgment with interest. On October 9, 1911, after due notice pursuant to the order of sale, the sheriff sold the stock, 200,000 shares to third

parties and the remainder to Marie M. T. Gibson, for sums just sufficient to satisfy the judgment, interest and sheriff's fees on sale. On October 14, 1911, and after the sale, the relator filed his supersedeas bond on his cross-appeal in the consolidated actions.

It is thus apparent that, before the garnishment proceedings were instituted, the principal action and every part thereof had been appealed to this court. The relator contends that this transferred the entire action to this court, and deprived the lower court of jurisdiction thereof for any purpose, and that the garnishment proceeding, being in its nature ancillary to the principal action, the trial court had no jurisdiction to entertain it. This contention must be sustained. The statute (Rem. & Bal. Code, § 988), confers upon the trial court or judge thereof in divorce proceedings power pending the action to make and enforce "such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper." The statute further provides (Rem. & Bal. Code, § 989), that, "in granting a divorce, the court shall also make such disposition of the property of the parties as shall appear just and equitable," etc. The section governing appeals in divorce proceedings (Rem. & Bal. Code, § 996), reads:

"In all instances where the superior court shall grant a divorce, it shall be for cause distinctly stated in the complaint, and proved, and found by the court, and the court shall state the facts found upon which the decree is rendered; and when either party shall signify a desire to appeal from any of the orders of the court, in the disposition of the property or of the children, the court shall certify the evidence adduced on the trial, and the supreme court shall be possessed of the whole case as fully as the superior court was, and may reverse, modify, or affirm said judgment, according to the real merits of the case."

We can conceive of no plainer terms to express the intention that upon the appeal the supreme court acquires jurisdiction of the whole case and for every purpose. *Holcomb v.*



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*Holcomb*, 49 Wash. 498, 95 Pac. 1091. It follows that the trial court by the appeal loses jurisdiction for any purpose.

“Garnishment proceedings, being purely ancillary to the suit against the principal defendant, depend upon it for their existence and validity. If, for any reason, the court fails to get jurisdiction of the principal suit, the garnishment must inevitably fall with it. This principle is universal.” Rood, *Garnishment*, § 224.

The garnishment proceeding being ancillary to the principal action, of which the trial court had lost jurisdiction by the appeal, it follows that the trial court had no jurisdiction to entertain it. The garnishment proceedings were, therefore, void from the beginning.

It is argued that, inasmuch as Stephen A. Gibson failed to file his supersedeas bond on his cross-appeal in the consolidated actions until after the sale in the garnishment proceeding, the lower court still had jurisdiction to enforce the judgment for costs and attorney’s fees. But it will be noted that § 996 above quoted does not make the transfer of the case appealed, or any part thereof, dependent upon the filing of a supersedeas bond. It expressly declares that, upon the appeal, “the supreme court shall be possessed of the whole case as fully as the superior court was.”

The cause is remanded, with directions to the lower court, upon citation to all persons interested, to vacate the judgment in the garnishment proceedings, set aside the sale of the stock, and take the necessary steps to reinvest the relator here with the title thereto, upon the books of the company.

[No. 10222. Department One. July 9, 1912.]

AMHERST INVESTMENT COMPANY, *Appellant*, v.  
GEORGE F. MEACHAM *et al.*, *Respondents*.<sup>1</sup>

**EVIDENCE—PAROL TO VARY WRITING.** Where a contract employing an agent to take charge of specified property was plain and explicit in defining the agent's duties, parol evidence that he in addition at the time agreed to pay certain rents for the employer is inadmissible as varying the terms of the writing.

**CONTRACTS —CONSTRUCTION — CONTEMPORANEOUS MEMORANDUM.** Where a contract is complete in itself, a memorandum of the subject-matter prepared by one party for his own convenience is inadmissible to aid in its construction, when the contract did not refer to the memorandum and the two were obviously independent of each other.

**CONTRACTS—ACCEPTANCE—SIGNING.** Where a signed offer of employment is accepted, the contract is complete although not signed by the other party.

**CONTRACTS—CONSTRUCTION BY PARTIES—EVIDENCE—ADMISSIBILITY.** The acts of the parties, as tending to show their interpretation of a contract, are not admissible where the contract was dated January 5, and the alleged breach occurred February 8, following, the contract was not ambiguous, and no practical interpretation put upon it by one party had been acquiesced in by the other.

Appeal from a judgment of the superior court for King county, Main, J., entered September 29, 1911, upon the verdict of a jury rendered in favor of the defendants, in an action for damages for breach of contract. Affirmed.

*Robert F. Booth* and *A. J. Falknor*, for appellant.

*Peters & Powell*, for respondents.

Gose, J.—This is an action to recover damages from a real estate broker. There was a judgment for the defendants. The plaintiff appeals.

<sup>1</sup>Reported in 124 Pac. 682.

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On January 5, 1909, the appellant executed and delivered to the respondent George F. Meacham the following written instrument:

“Seattle, Washington, Jan. 5, 09.

“George F. Meacham & Co., 200 New York Building, Seattle, Washington.

“We hereby appoint you our agent for a term of one year from date and authorize you to take charge of the following described property, to wit: (Street and number) 1600 to 1610½ 2d Ave. inclusive. (Lot, block, addition, size) W. ½ L. 9 B. 45 & W ½ L. 12 B. 45 A. A. Dennys Add. to collect the rents arising therefrom and to remit the same to us monthly. You are to pay taxes and assessments. You are to pay water rent. Tenants are to pay garbage removal. We hereby agree to pay you a commission of three per cent (3%) on all amounts collected from said premises during the term of this agreement. I also agree that you shall not be held responsible for any injury or damage to said premises or for loss of or injury to any furniture, fixtures, or other articles therein, or for loss arising from failure to pay any tax or assessment when due. No repairs are to be made upon said premises without written consent.

“Listed by Tilton.

Amherst Investment Co.

“By A. N. Ashley, Pres.”

The respondent retained the writing and accepted the employment. The appellant sought to show by parol evidence that the respondents, at the time of the execution and delivery of the instrument, agreed to pay the rent on lot 12, upon which the former held a lease, as the rent matured; that they failed to do so, and that as a consequence it sustained large damages which it seeks to recover in this action. The court refused to admit the evidence, on the ground that it would contradict the terms of the writing. The correctness of this ruling is the controlling question in the case. We think the ruling was correct. The contract is plain, detailed, and explicit. The evidence tendered would be a flat contradiction of the express terms of the contract. The contract clearly specifies the duties and obligations of the respective parties. It devolves upon the respondent the duties

(1) to take charge of the property, (2) to collect the rents and remit the same to the appellant, (3) to pay taxes and assessments, and (4) to pay water rent. In consideration of these services, the appellant agreed to pay the respondent a commission of three per cent. The annual rent on lot 12 was \$5,000, payable quarterly. The \$1,250, which fell due on February 8, 1909, was not paid, and the appellant seeks to hold the respondents responsible for the consequences flowing from its nonpayment. This would make a new contract for the parties. Reading the contract as an entirety, the duty of the respondent was to collect the rent from the tenant, pay taxes, assessments and water rent, and remit the remainder to the appellant. Analysis and discussion cannot clarify the contract, and they will not be resorted to for the purpose of obscuring or emasculating it. Written contracts would become valueless if parol evidence were admitted to show a duty upon either party in plain contradiction of the written stipulations.

The appellant argues that the evidence was admissible for the purpose of showing what was comprehended in the words "to take charge of" the property. The meaning of these words is made clear by the specific provisions which follow them.

The respondents prepared and retained a memorandum of the subject-matter of the contract for their own convenience. The appellant sought to introduce this in evidence. Its contention is that the marginal words "Listed by Tilton" are such a reference to the memorandum as to make it competent evidence. Obviously the two writings are independent of each other. The contract does not refer to the memorandum or any other writing, but is complete in itself. The words were no doubt used to identify the party who conducted the negotiations for the respondents and for their use and convenience only.

It is argued that the contract is not complete, in that it was not signed by the respondents. It was, however, ac-

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cepted by them, and they assumed to act under it. This made it as obligatory upon them as though they had signed it in the first instance. *Lamson Consol. Store Service Co. v. Hartung*, 19 N. Y. Supp. 233; *Collins v. Dignowity* (Tex.), 8 S. W. 326; *Pickrel v. Rose*, 87 Ill. 263; *Commercial State Bank v. Antelope County*, 48 Neb. 496, 67 N. W. 465; *Wiley v. California Hosiery Co.* (Cal.), 32 Pac. 522; *Finck v. Schaubacher*, 34 Misc. Rep. 547, 69 N. Y. Supp. 977. This view is expressed with marked clarity in the *Hartung* case in the following language:

“We affirm these propositions as true beyond doubt or discussion, namely, that where a written offer, containing expressly or by implication all the engagements appropriate and necessary to the agreement, is signed by one party and accepted by the other, it constitutes such a complete contract between them that oral evidence is inadmissible to add to its terms; and that, if such a contract be an executory agreement for the sale of a chattel, a warranty of the thing so sold is not open to proof by parol testimony.”

The *Collins* case thus announces the same view:

“Though signed by one of the parties only, it contains the stipulations to be performed by both, and must be held to express fully the final agreements upon which their minds met, and to have merged in it all preliminary negotiations.”

The appellant, among other cases, has cited *Puget Sound Iron & Steel Works v. Clemmons*, 32 Wash. 36, 72 Pac. 465. In that case the court adverted to the fact that the order for the machinery which was the subject-matter of the litigation did not purport to contain any part of the contract or conditions which the party to whom the order was addressed was to perform. The court said, however, quoting from *Gordon v. Parke & Lacy Machinery Co.*, 10 Wash. 18, 38 Pac. 755, that, “The test of the completeness of the writing proposed as a contract is the writing itself.” That, we apprehend, is the true criterion in all cases where written instruments are to be construed. *Patterson v. Wenatchee Canning Co.*, 59 Wash. 556, 110 Pac. 379, is also cited by the appellant.

The opinion in that case definitely states that the parol evidence was offered to supply that which was omitted from the contract, rather than to vary its terms. In *Kleeb v. McInturff*, 62 Wash. 508, 114 Pac. 184, also cited by the appellant, the court said that parol evidence was admissible where a collateral writing does not undertake to state all the terms of the contract. Without pursuing the inquiry further, it suffices to say that the contract is plain, specific, and complete as to both parties, and in such cases the written instrument speaks the contract.

The appellant also sought to show the acts of the respondents as tending to show their interpretation of the contract. The contract was made on January 5, 1909, and the breach relied upon is alleged to have occurred on February 8 following. This character of evidence is only admissible where the terms of the contract are ambiguous or there has been a practical interpretation put upon it by one of the parties and acquiesced in by the other for a long period of time. As the court said in *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225, "If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto is of great weight." This rule of construction is fundamental, but it affords no comfort to appellant. There are no elements of fraud, accident, or mistake in the case at bar, and the contract is complete in itself and free from ambiguity, and needs no extrinsic aid in its interpretation.

The judgment is affirmed.

CHADWICK, CROW, and PARKER, JJ., concur.

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Opinion Per Curiam.

[No. 10374. Department One. July 10, 1912.]

C. E. GILMUR, *Respondent*, v. THE CITY OF SEATTLE *et al.*,  
*Appellants*.<sup>1</sup>

MUNICIPAL CORPORATIONS—OFFICERS—CIVIL SERVICE—TITLE OF OFFICE—ORDINANCES. An ordinance renaming the different positions in a city department, and making the name correspond to the duties, does not affect the right of the incumbent to hold the position under the civil service rules, the duties remaining the same as before and he having taken the requisite examination before the passage of the renaming ordinance.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered February 26, 1912, upon findings in favor of the plaintiff, in an action for an injunction, after a trial to the court. Affirmed.

*James E. Bradford, Melvin S. Good, and W. F. Van Ruff*, for appellants.

*Preston & Thorgrimson and Sandford C. Rose*, for respondent.

PER CURIAM.—This is a bill in equity for a mandatory injunction, requiring the civil service commission of the city of Seattle to recognize the plaintiff as a legally constituted foreman of outside construction, to approve the salary roll of the lighting department of the city respecting his salary, and requiring the city to issue his salary warrants. There was a decree for the plaintiff. The defendants prosecute the appeal.

The appeal presents but one question, viz., is the respondent a foreman of outside construction work. The court found that, prior to April 1, 1905, the respondent was foreman of outside construction; that about that time his position, together with various other positions in the newly organized

<sup>1</sup>Reported in 124 Pac. 919.

lighting department, was placed under civil service; that Ordinance No. 12,113 was passed creating the position of "foreman of pole gang," such position being intended to cover the position then held by the respondent, to wit, that of foreman of outside construction; that in April, 1905, the respondent passed the requisite examination for the position he then held, and that he has ever since continued to occupy the position. The court further found that, in December, 1908, Ordinance No. 19,853 was passed renaming the different positions in the lighting department, which changed the name of the respondent's position to that of "foreman of outside construction;" that he has ever since been carried on the rolls of the city under the amended title; and that the civil service commission thereafter, and until September, 1911, checked the monthly pay rolls of the lighting department and forwarded them to the city comptroller, without objection to the respondent holding that position. These findings are abundantly sustained by the evidence. It is made clear that the purpose of the ordinance of 1908, in so far as it touched the respondent's rights, was to make the title of his position correspond with his duties. The appellant's contention is that the ordinance of 1908 created a new position to which the respondent could not lawfully be appointed without passing the civil service examination. This contention is not in harmony with the evidence. He passed the examination for the position, and when it was renamed he was not required to pass another examination. His duties remained the same after the passage of the second ordinance, and the title of his office is of no moment.

The decree is affirmed.



[No. 10276. Department Two. July 10, 1912.]

PACIFIC AMERICAN FISHERIES, *Appellant*, v. WHATCOM  
COUNTY *et al.*, *Respondents*.<sup>1</sup>

MUNICIPAL CORPORATIONS—BOUNDARIES—EXTENSIONS—STATUTES. The boundaries of cities are extended by Rem. & Bal. Code, § 7443, providing that the powers and jurisdiction of all incorporated cities bounded by navigable waters be and the same are hereby extended to the middle of such waters in every manner and for every purpose exercised within the city's limits; and hence authorizes the levy of city taxes upon property situated within the extended limits.

STATUTES—TITLE—SCOPE. The title, an act extending the powers and jurisdiction of cities into the navigable waters adjacent to their boundaries, sufficiently expresses the purpose of the act to extend the boundaries of the city for all purposes.

MUNICIPAL CORPORATIONS—SPECIAL LAWS—BOUNDARIES. An act extending the boundaries of all cities to the middle of navigable waters adjacent to their boundaries, is not violative of the constitutional provisions inhibiting the incorporation or alteration of cities by special laws, or the enactment of any private or special laws granting corporate powers or privileges.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered December 14, 1911, upon an agreed statement of facts, dismissing an action to restrain the collection of a tax. Affirmed.

*Kerr & McCord, Hadley, Hadley & Abbott, and Newman & Howard*, for appellant.

*Birby & Thompson, Thomas L. McFadden, and Dan L. North* (*J. W. Romaine* and *C. E. Abrams*, of counsel), for respondents.

MOUNT, J.—This action was brought to enjoin the defendants from enforcing the collection of a tax, levied by the city of Bellingham upon the personal property of the plaintiff. The cause was submitted to the trial court upon an agreed statement of facts, from which the court concluded

<sup>1</sup>Reported in 124 Pac. 905.

that the plaintiff's property was liable for the tax, and therefore refused the relief prayed for. The plaintiff has appealed.

It appears from the agreed statement, that the city of Bellingham is an incorporated city of the first class;

"That, at all times hereinafter mentioned, this plaintiff was, and now is, the owner of certain personal property situated in the county of Whatcom, state of Washington, consisting mainly of steamboats, scows, general merchandise, manufacturing tools and implements, and improvements consisting of buildings on lands held under lease from the state of Washington, or on tide lands below the government meander line, all of which personal property is located and situated upon said leased lands and tide lands, which are adjacent to and outside of the westerly boundaries of the city of Bellingham, as the same were fixed and determined prior to an act of the legislature of the state of Washington, approved March 13, 1909, entitled, 'An Act extending the powers and jurisdiction of incorporated cities into the bays, lakes, sounds, rivers and other navigable waters adjacent to the boundaries of such cities and declaring an emergency;' same being chapter 111 of the Laws of 1909, p. 392 (Rem. & Bal. Code, § 7443); that said lands and property are situated between said boundaries of the city of Bellingham and the middle of Bellingham Bay in front of said city;"

that, for the year 1910, the city levied a tax of eight mills on the dollar for municipal purposes upon all of the property of the plaintiff as above stated; that the city and its officers are proceeding to collect this tax, and that the plaintiff has refused to pay.

It is also stipulated that the plaintiff uses large quantities of water and of electric light and power furnished by private public service corporations authorized to use the streets of the city for such purpose; that the plaintiff has fire alarm stations connected with the city fire department, and received the services thereof, and that the city maintains improved and paved streets leading to plaintiff's property. We think these conveniences do not affect the case.

The main question is whether the plaintiff's property is located within the limits of the city, and is therefore subject to taxation for municipal purposes. In 1909 the legislature passed the following act:

"An act extending the powers and jurisdiction of incorporated cities into the bays, lakes, sounds, rivers and navigable waters adjacent to the boundaries of said city, and declaring an emergency.

"Sec. 1. That the powers and jurisdiction of all incorporated cities of the state of Washington having their boundaries or any part of their boundaries adjacent to or fronting on the bay or bays, lake or lakes, sound or sounds, river or rivers, or other navigable waters, be and the same are hereby extended into and over said waters and over any tide lands intervening between any such boundary and any such waters to the middle of such bays, sounds, lakes, rivers or other waters, in every manner and for every purpose that such powers and jurisdiction could be exercised when such cities' limits include such waters or any part of such waters: Provided, that in towns of the fourth class the territory added by this act shall be over and above the one square mile now established by law as the maximum territory within the limits of such town.

"Sec. 2. An emergency exists and this act shall take effect immediately." Laws 1909, p. 392 (Rem. & Bal. Code, § 7443).

It is argued by the appellant, (1) that this act does not purport to extend the boundaries of such cities, but fixes the limit of extraterritorial powers of such cities, such as police powers; (2) that, if the act be held to extend the boundaries of such cities, it is void because the subject of the act is not expressed in the title; and (3) that the act is a special act, and therefore void under the provisions of § 28 of art. 2, and § 10 of art. 11, of the constitution. We shall notice these points briefly in the order stated.

A reading of § 1 of the act is convincing that the legislature intended to extend the boundaries of such cities to the middle of such bays, for it says, "The powers and jurisdiction of" such cities "be and the same are hereby extended

. . . to the middle of such bays . . . in every manner and for every purpose that such powers and jurisdiction could be exercised when such cities' limits include such waters." The mere fact that the powers and jurisdiction, in every manner and for every purpose, are extended, necessarily extended the boundaries. It seems plain that this was the purpose and object of the act. Appellant very plausibly argues that the police power only was extended beyond the boundaries of the city, and that the boundaries were not affected. But this seems too narrow a view to take of the act, when it provides that the powers and jurisdiction are extended *in every manner and for every purpose*. The act plainly was intended to, and does, extend the boundaries to the middle of such bays.

Appellant argues that, if this construction is given to the statute, then the title is insufficient, because the subject of the act is not expressed in the title. The title is: "An act extending the powers and jurisdiction of incorporated cities into the bays . . . adjacent to the boundaries of such cities." The extension of the powers and jurisdiction of the cities for every purpose over certain territory necessarily extends the boundaries of such cities, and *vice versa* the extension of the boundaries necessarily extends the powers and jurisdiction of the cities for every purpose. In short, the subject of the act is the same, whether expressed one way or the other, and was as definitely expressed in the one way as it might have been in the other.

Appellant next argues that the act is in violation of § 10, art. 11, of the constitution, which provides that: "Corporations for municipal purposes shall not be created by special laws, but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed." And also § 28 of art. 2 which provides: "The legislature is prohibited from enacting any private or special law. . . For granting corporate powers

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or privileges." This act does not purport to create a municipal corporation, or to affect the classification already existing, or to grant any new powers or privileges not exercised by all cities. It simply extends the boundaries of cities located on bays, etc. It is general in the sense that it applies to all cities so located, and in any event is not a special or private law which applies to a particular municipality, and therefore does not come within the constitutional prohibition. *State ex rel. Hunt v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802. We are satisfied that the act is valid, and that the appellant's property was within the boundaries and the jurisdiction of the city for taxation and all other municipal purposes.

The judgment is therefore affirmed.

FULLERTON, ELLIS, CROW, and MORRIS, JJ., concur.

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[No. 10323. Department Two. July 10, 1912.]

KATIE HENNELLY, *Appellant*, v. BISHOP EDWARD J. O'DEA,  
*as Executor etc., Respondent*.<sup>1</sup>

WORK AND LABOR—CONTRACTS—EVIDENCE—SUFFICIENCY. A claim that plaintiff's deceased uncle had agreed to give her the house and lot on which he lived, worth \$20,000, in consideration of her coming west and keeping house for him, she to have no salary or other compensation, is not sustained by the evidence, where it appears that the deceased's letters making such an offer were not acted upon for three years, that meanwhile he made a will disposing of the property, that plaintiff came west when she was not expected by him about a month before his death, and that she did not contest the will, but filed a claim against his estate for her expenses in coming west and for services in attendance upon the deceased, amounting to \$470, which was allowed.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered February 21, 1912, dismissing an action to quiet title, after a trial on the merits to the court. Affirmed.

<sup>1</sup>Reported in 124 Pac. 1123.

*George Friend, C. A. Riddle, and Million & Houser, for appellant.*

*Farrell, Kane & Stratton, for respondent.*

MOUNT, J.—The plaintiff brought this action to quiet title to two lots in the city of Seattle. Upon a trial of the case to the court without a jury, the complaint was dismissed, and title quieted in the defendant as executor. The plaintiff has appealed.

The plaintiff bases her claim to the property upon an alleged promise made by John W. Manley during his lifetime that, if the plaintiff would come from the state of New York to Seattle and care for him during his lifetime, he would pay her no wages but would give her the property in question; that, upon this request, she came from New York to Seattle, where she arrived about the 1st of September, 1908, and cared for Mr. Manley until his death upon October 9, following. It appears from the evidence that John W. Manley came from Ireland to this country about forty years prior to his death. He had lived in Seattle for the last thirty years, and at the time of his death was about eighty years of age. He was a bachelor and a devoted member of the Catholic church. He accumulated considerable property, among which were the lots in dispute, valued at about \$20,000. He lived upon these lots in a small hut. Early in the year 1907, he became ill and went to the Providence Hospital for treatment. While there, on February 13, 1907, he made a will by which he bequeathed his property to certain charitable uses and to certain relatives, making stated bequests to each. The will named Bishop Edward John O'Dea as executor. After making this will, Mr. Manley recovered from his illness and returned to his home, where he remained until his death.

The plaintiff is a grandniece of Mr. Manley. She came to Seattle on Monday, September 7, 1908. When she came, Mr. Manley was not expecting her, and had no place for her

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to stay. He took her to a neighbor's house, where she lived for about a week, and then she went to Mr. Manley's house and cared for him about four weeks, or until his death on October 9. After Mr. Manley's death, the plaintiff lived with a neighbor for about a month, and during that time she had the house repaired and subsequently lived there. Later the will above mentioned was admitted to probate, and Bishop O'Dea was appointed executor. The will was contested by certain relatives, but the contest apparently failed. The plaintiff was not one of the contestants. On September 18, 1909, nearly a year after Mr. Manley's death, the plaintiff filed a claim for \$470 against the estate; \$350 of this claim was for expenses in coming from New York to Seattle and return to Ireland; \$20 was for money loaned to deceased; and \$100 was for "attendance upon said deceased and housework for four weeks prior to the death of deceased, at the rate of \$25 per week." This claim was approved by the executor on October 13, 1909. Thereafter, on June 25, 1910, this action was begun. Upon the trial of the case, the plaintiff testified that, some two or three years before she came out to Seattle, she had received three letters from Mr. Manley, while she was residing with relatives in the state of New York; that when she was getting ready to come out here, she destroyed these letters. These relatives testified that they had seen the letters from Mr. Manley to the plaintiff, and that the letters read about as follows:

"Dear Katie: I would like if you would come out and take care of me and I will give you this house that I am living in and you give up your position in New York and come out with me. I wont pay you any salary."

This testimony was admitted over the objection of the defendant, but when the court came to consider the evidence, the judge was of the opinion that it was inadmissible, under Rem. & Bal. Code, § 1211, which provides that a party in interest or to the record shall not be permitted to testify in his own behalf as to any transaction had by him with the deceased

person. The court was of opinion that the receipt of the letters was a transaction had by the plaintiff with the deceased, and for that reason declined to consider the evidence. The plaintiff's brother, who had lived with Mr. Manley for about two years prior to the time the plaintiff came to Seattle, testified that, after his sister came to Mr. Manley's place, he heard Mr. Manley say to plaintiff: "Katie, this will be your place if you will take care of me until my death. But, remember, there is no salary coming to you." The trial court gave little or no credence to this testimony.

It is argued by the appellant that the court erred in refusing to consider the evidence relating to the letters. The greater part of the argument in the briefs is devoted to this question. We deem it unnecessary to decide this question in this case; because, if we should conclude that all of the testimony offered in regard to the letters is proper, we are still of the opinion that the evidence preponderates against the plaintiff's contention that the deceased gave, or intended to give, the property to her. The letters upon which plaintiff bases her claim were written, if written at all, two or three years prior to the time she finally came to Seattle; and if Mr. Manley in his lifetime had desired her to come and care for him, he had abandoned all hope that she would come, and in the meantime had made a will and devised his property. There is credible evidence to the effect that, when the plaintiff came to Seattle, she came without notice to the deceased. He was entirely unprepared for her. He took her to a neighbor's where she stayed for a week or more, and there stated that she had come out here to see her brother and the country. She did not then claim that she had come for the purpose of caring for Mr. Manley. After Mr. Manley's death, she made no claim to the property for nearly a year; and prior to her claim to the property, others had contested the will, and then she filed a verified claim against the estate for a salary of \$25 per week for attendance upon the deceased and for household work prior to his death. This



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claim for a salary directly contradicted the provisions of the contract which she is now seeking to enforce; because that contract, if made, provided that she should have no salary.

It also appears that Mr. Manley, prior to his death, was of the opinion that an attempt would be made to divert his property in a manner other than his will directed; for on August 31, 1908, about a month prior to the time when plaintiff came to Seattle, and about two months prior to his death, Mr. Manley wrote a letter to a priest living near his old home in Ireland, in which the deceased said:

“Eighteen months ago I had a cold they call la grippe. I went to the hospital. I had some business that meant to have done and I sent for the lawyer that used to do my business. My nephew was here at the time. He that was over there some years ago. This lawyer took my nephew up to his and made a great inquiry about all my relatives and he got freely. Now this was to break or try to break my will, for I a will made. This could give notice to all these people they would of course appoint him their counsel and agent and he would get all of my savings. Now, father, by a mere chance I have learned of this a few days ago. Had my nephew told me of the blunder he made I would be guarded against any such attempt to meddle with my affairs. Now I wish you to keep this letter and other of my letters that you think would be of importance to my interests. Now I do protest and deny to any person or persons a right or privilege to meddle in my affairs, I know my own business. I may make another will or maybe later a deed to the church of Seattle. I wish you to be careful of my letters. I am not feeling well. I am grieved and heartbroken this blunder after blunder. I have no one that I could rely on.”

These and other facts and circumstances tend very strongly to discredit the testimony of the plaintiff's brother, and to show that the claim now made by the plaintiff is not made in good faith. The trial judge was of this opinion also, for in deciding the case he said:

“When we take into consideration also the fact that the plaintiff destroyed letters which she claimed to have received from the deceased upon the eve of her departure from New

York to accept the offer contained in these letters; that she resided with Mrs. Ford for about ten days upon arrival here and never made mention of the fact that she had come out here to take care of her uncle; that she told Mrs. Ford that she was going down to keep house for her brother at Eighth avenue and Pike street; that on Manley's death she and her brother turned all the papers and effects over to defendant in this case as executor; that she made no claim to the property until eleven months after his death and then only because a contest was being waged against the will, and thereupon she filed a claim against the estate for services amounting to \$470, we are forced to conclude that the plaintiff has not sustained her cause of action with that degree of evidence which the law requires."

Upon all the facts in the case, we think the conclusion reached by the trial court was right. The judgment is therefore affirmed.

FULLERTON, ELLIS, MORRIS, and GOSE, JJ., concur.

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[No. 10548. Department Two. July 13, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Laura E. Flint et al., Plaintiff*, v. THE SUPERIOR COURT  
FOR THURSTON COUNTY, *Respondent*.<sup>1</sup>

EMINENT DOMAIN—PURPOSES—PLEADING AND PROOF—RAILROAD RIGHT OF WAY. In eminent domain proceedings to condemn a right of way necessary for a new railway line, and also necessary for the petitioner's use in the construction, maintenance, and operation of another old line which is coincident with the new line at a certain point, land may be condemned for the purpose of a necessary slope on moving the old line to the west in order to make a fill for the new line, forty feet above the old line.

Certiorari to review an order of the superior court for Thurston county, Mitchell, J., entered June 20, 1912, adjudging a public use in proceedings to condemn land for a

<sup>1</sup>Reported in 124 Pac. 1127.

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railroad right of way, after a hearing before the court. Affirmed.

*Thos. M. Vance* and *H. L. Parr*, for relators.

*Geo. T. Reid*, *J. W. Quick*, and *L. B. da Ponte*, for respondent.

MORRIS, J.—Writ of certiorari to review the order of the lower court in entering its order of public use and calling a jury to ascertain the damages, in a proceeding in which the Northern Pacific Railway Company is seeking to condemn lands of the relators. The writ is sued out upon the ground that the evidence upon the preliminary hearing failed to show that the lands were desired or necessary for the purposes set forth in the petition, and did affirmatively show that the lands were required for purposes other than those disclosed in the petition. The purpose for which it is sought to appropriate these lands is set forth in the petition as follows:

“That in the construction and operation of its line of railroad from the city of Tacoma to the city of Portland for the double tracking and improvement thereof in the construction of tunnel, switches, side tracks, turnouts and elimination of dangerous and undesirable grades and curves, it is necessary for petitioner to condemn and appropriate for a part of its right of way certain lands and premises (describing them); that the above described premises are necessary for petitioner’s use in the construction, maintenance, and operation of its said line of railroad from the city of Tacoma through Pierce county and other counties in the state of Washington to the city of Portland in the state of Oregon, and to Grays Harbor, Willapa Harbor and other points in the state of Washington, and the interests and necessities of the public require the appropriation and condemnation of said premises by petitioner for the purposes aforesaid.”

The evidence shows that, at the point in question, the new line of the Northern Pacific Railway Company from Tacoma to Portland, known as the “water line,” is coincident with

what is generally known as the Grays Harbor line; that it is the intention at this point to lay and maintain four tracks for the use of the water line, and that in order to do so and maintain the desired grade, it was necessary to construct a seventy-foot fill with appropriate and necessary slopes. The water line at this point is forty feet above the Grays Harbor line and, in order to maintain the desired slope, it will be necessary to move the Grays Harbor line approximately sixty feet to the west of its present location and about forty feet east of the present west line of the right of way. It is upon this fact that relators base their attack upon the ruling of the lower court, contending that it is thus shown that the lands of relators are required to furnish slopes to the embankment supporting the Grays Harbor line and not the water line.

The evidence, in our opinion, does not support this contention. The evidence of the engineer in charge of the work upon this point is as follows:

“Q. Suppose that there was no Olympia-Grays Harbor line to be taken care of, is there sufficient space beyond your four hundred-foot strip there to take care of your slope? A. Not entirely, no sir. Q. Isn't it a fact that this 100x300 foot strip is to take care of the slopes made necessary by the change in location and the moving of the Olympia-Grays Harbor line rather than by the original construction of the water level line, the main line? A. Well, the two are so closely related, what is necessary for one is necessary for the other; in other words, in the construction of the new line you naturally have to meet these problems, to take care of the old line where they interfere. The direct cause is the building of the new line. Q. Well, I don't think you answered my question; what I asked was this, if you can tell me as an engineer isn't this land necessary to protect the slope of the Olympia-Grays Harbor line as it is to be moved, and not the slope of the big four upon the main line? A. Well, a portion of it is and a portion of it is not. Q. What portion is for that purpose? A. Probably half of it would be necessary for that. Q. . . . Given a four hundred-foot right of way at this particular point, do you mean to be understood as

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saying that to construct a four-track railway along there it is necessary to take this one hundred feet? A. Well, I will answer it in this way: It is necessary for reasonable construction."

No other witness testified upon this point. This testimony is clearly sufficient to enable the lower court to hold that the necessities of the water line demanded the lands of relators for the construction and maintenance of a proper slope. By referring to the purpose of the condemnation, as quoted from the petition, it will be noted that the lands of relator are not required for the sole purpose of the water line, but that it is also set forth that they "are necessary for petitioner's use in the construction, maintenance and operation of its said line of railroad from the city of Tacoma . . . to Grays Harbor . . . and other points . . ." The last described purpose would include the so-called Grays Harbor line.

We are therefore of the opinion that no error has been committed by the lower court, and its orders and judgments here reviewed are affirmed.

MOUNT, ELLIS, and FULLERTON, JJ., concur.

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[No. 10372. Department Two. July 15, 1912.]

FRANK P. DALTON *et al.*, Respondents, v. UNION GAP  
IRRIGATION COMPANY, Appellant.<sup>1</sup>

**TRIAL—SUBMISSION OF ISSUE TO JURY—INJUNCTION—EQUITY.** In an action for damages from flooding land, and for an injunction, it is not error to submit the issue of damages to a jury for an advisory verdict.

**APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** Error cannot be predicated on an instruction to which no exceptions were taken.

**APPEAL—ASSIGNMENTS OF ERROR.** An assignment of error in failing to sustain objections of appellant's counsel as shown by the statement of facts is too general.

<sup>1</sup>Reported in 124 Pac. 1128.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered November 7, 1911, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages from flooding and for an injunction, after a trial on the merits. Affirmed.

*G. G. Lee and C. F. Bolin*, for appellant.

*E. B. Velikanje and R. B. Milroy*, for respondents.

MORRIS, J.—This action was brought to recover damages to respondents' lands caused by water from appellant's ditch. In addition to damages, respondents sought to enjoin appellant from turning more water upon the lands and causing additional damage. Respondents are the owners of lands through which runs a natural draw containing nearly four acres. Appellant owns and operates a ditch some distance above respondents' lands, and during the time in controversy here, maintained a spillway, which permitted waste water to flow down the draw and upon respondents' lands. A temporary injunction was granted against the flow of water through this spillway during the pendency of the action. When the case came on for trial, a jury was called, and the question of damages was submitted to it, and a verdict returned fixing the damages at \$290. From a judgment upon this verdict, the appeal is taken.

It is first contended, that the court committed error in submitting the damages to a jury; that this was an equitable action and the court should have passed upon all questions of law and fact raised by the issues. There is no merit in this contention. Whatever the character of the action, the court could, if it so desired, call a jury and submit to it any disputed question of fact. Even in purely equitable actions, the method of determining questions of fact is discretionary with the court. It may try all the issues, or may submit all or part of any issuable question of fact to a jury, using the verdict as advisory merely and in no manner bound

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thereby should it not meet with approval. *State ex rel. Hill v. Lichtenberg*, 4 Wash. 553, 30 Pac. 659; *Wheeler, Osgood & Co. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Wintermute v. Carner*, 8 Wash. 585, 36 Pac. 490; *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

Complaint is also made of the measure of damages adopted by the court. We can find nothing in the record justifying appellant's contention in this regard. The exceptions taken seem to be by respondents in an attempt to go further than the court would permit. When the court instructed the jury, it give them the measure to be used in arriving at the damages. To this instruction the record shows no exception was taken. It cannot therefore be attacked here. It is not necessary to determine whether this instruction was right or wrong, since in the face of the record no advantage can be taken of it. We must therefore refuse to determine what would be the correct measure of damages in such a case, since the question is not properly before us.

The next error assigned is in this language:

"That the court erred in his failure to sustain the objections of appellant's counsel, as shown by the statement of facts."

This assignment is altogether too general to avail appellant anything.

The judgment is affirmed.

MOUNT, ELLIS, PARKER, and FULLERTON, JJ., concur.

[No. 6803. Department Two. July 15, 1912.]

ROBERT KATH, *Appellant*, v. S. L. BROWN *et al.*,  
*Respondents*.<sup>1</sup>

JUDGMENT—CONCLUSIVENESS—VACATION—ACTION—LACHES. A defendant is estopped by laches and by a restraining order, unappealed from, from attacking a judgment on the ground of fraud, where, on his appeal from an order refusing to vacate the judgment on his petition, the appeal was dismissed because he had failed to obtain permission of the supreme court to attack the judgment, and for three years thereafter neglected to obtain such permission, and was meanwhile restrained from bringing any action affecting plaintiff's title to the land which was the subject of the former suit.

Application filed in the supreme court June 10, 1912, for leave to file a petition to vacate a judgment. Denied.

*Paul Shaffrath*, for petitioner.

*A. G. McBride*, for respondent Histogenetic Medicine Company.

MOUNT, J.—This is an application to this court for permission to file a petition in the lower court to vacate a judgment heretofore affirmed by this court. It is alleged in the application that the judgment in the lower court was obtained by fraud. It appears that an appeal was prosecuted to this court by the plaintiff in that action. That appeal was abandoned and dismissed in July, 1907. Thereafter a petition was filed in the case in the lower court to set aside the judgment upon the ground of fraud and conspiracy. The questions then presented were heard and the trial court refused to set the judgment aside. An appeal was prosecuted from that order to this court. That appeal was dismissed on June 11, 1909, and the judgment affirmed for the reason that the trial court had no jurisdiction to hear the

<sup>1</sup>Reported in 124 Pac. 900.



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questions presented without permission of this court. *Kath v. Brown*, 53 Wash. 480, 102 Pac. 424, 132 Am. St. 1084.

Thereafter an action was brought by the defendant in that action against the plaintiff, to restrain the plaintiff from bringing actions affecting the title of the real estate in question. That action came on regularly for trial and resulted in the decree restraining the plaintiff, who is the petitioner here, from "bringing or instituting against the plaintiff herein or against the plaintiff's successors or assigns any suit or action in this court affecting the title to the following described real property." Then follows a description of the property in question. That decree was entered on October 22, 1910, and is in full force and effect. It was not appealed from.

It therefore appears in this case that the applicant has once unsuccessfully tried the same questions in the lower court which he now seeks permission to again try. It is true, he claims to have some newly discovered evidence, but the questions are the same. It also appears that he has neglected for three years to avail himself of the remedy pointed out in *Kath v. Brown, supra*, and that in the meantime a restraining order has been issued against him, which order has become final and binding. In short if we should grant the application now made, we would in effect set aside the restraining order without a hearing thereon. We are of the opinion, therefore, that, even if the plaintiff's showing, if made in time, would have been sufficient, he is now barred by laches and by the restraining order above mentioned which has become final. The application is therefore denied.

FULLERTON and ELLIS, JJ., concur.

MORRIS, J., having heard the case below, took no part.

[No. 10133. Department Two. July 15, 1912.]

J. L. JAFJE, *Respondent*, v. PACIFIC BREWING & MALTING  
COMPANY *et al.*, *Appellants*.<sup>1</sup>

INTOXICATING LIQUORS—LICENSES—TRANSFER—DESCENT—TROVER AND CONVERSION—PROPERTY. A retail liquor license is property which passes to personal representatives on the death of the holder, as against third persons unlawfully converting the same to their own use, where the city charter and ordinances provides for transfers by and with the consent of the city council or to *bona fide* purchasers.

Appeal from a judgment of the superior court for Whatcom county, Kellogg, J., entered June 5, 1911, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, after a trial on the merits. Affirmed.

*S. M. Bruce*, for appellants.

*Craven & Greene*, for respondent.

MOUNT, J.—During his lifetime, H. S. Kornfield was conducting a retail liquor business, in the city of Bellingham. The city had issued to him a retail liquor license in consideration of \$1,000, authorizing the sale of liquors at his place of business from June 30, 1909, to June 30, 1910. He conducted business under this license until January, 1910, when he died. His widow was appointed administratrix of his estate. This liquor license was scheduled as a part of the estate. After the death of Mr. Kornfield, the Pacific Brewing & Malting Company, without the consent of the administratrix, took the license certificate from its place in the saloon and had it transferred by the city to the defendant Louis Kornfield. Thereafter the administratrix, by authority of an order of the superior court in probate, sold at public sale the stock of goods on hand, including the liquor license, and the plaintiff became the purchaser at such sale. Thereafter

<sup>1</sup>Reported in 124 Pac. 1122.

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the plaintiff demanded a return of the license, which was refused. He subsequently brought this action to recover the value of the license and damages. Upon the trial of the case to the jury, the court directed a verdict and entered a judgment in favor of the plaintiff, for \$354.15, the value of the unexpired portion of the license. The defendants have appealed.

Several assignments of error are made; but the position of appellant is that a liquor license is not property in the ordinary acceptance of the term, that it does not pass by descent, and is not assets in the hands of an administrator, and such administrator or successor in estate would not be authorized to conduct business under such license. It is no doubt true, as we have heretofore said, that a "license to sell intoxicating liquors is merely a temporary permit, and not a contract giving vested or property rights." *State ex rel. Aberdeen v. Superior Court*, 44 Wash. 526, 87 Pac. 818; *Krueger v. Colville*, 49 Wash. 295, 95 Pac. 81; *State ex rel. Pasco v. Superior Court*, 49 Wash. 268, 94 Pac. 1086. The right to conduct the business is personal to the licensee, and does not pass upon his death to his administrators or assigns. But this is true only as between the state or the licensor and the licensee, and as to third persons when the statutes do not permit transfers from one person to another.

"But where the statute recognizes the right of transfer from one to another, and where the right is a valuable right, capable of being surrendered and reduced to money, a different rule prevails. In such cases the license or right to do business becomes a valuable property right, subject to barter and sale. It is property with value and quality." *Degging v. Seattle Brewing & Malting Co.*, 41 Wash. 385, 83 Pac. 898, 4 L. R. A. (N. S.) 626.

This latter rule prevails in this case, because the city charter of Bellingham provides that "any license . . . may be transferred by and with the consent of the city council, and the rights given to the holder . . . shall inure to the person to whom transferred." City Charter, § 96. A city Ordi-

nance, No. 70, also provides for a transfer of such license to a *bona fide* purchaser. It seems plain, therefore, that, as between the plaintiff and the defendants, the license was a valuable property right, and the defendants were liable for the value of the license which they had taken and converted to their own use without right, as much so as though they had taken the stock of goods on hand or any other property. It is conceded that the value of the unexpired portion of this license was the sum of \$354.15, for which the court entered judgment. This is conclusive of the case, and it is therefore unnecessary to notice other points.

The judgment is affirmed.

CHADWICK, FULLERTON, ELLIS, and MORRIS, JJ., concur.

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[No. 10322. Department One. July 15, 1912.]

W. H. WELLS, *Respondent*, v. D. A. DUFFY, *Appellant*.<sup>1</sup>

BILLS AND NOTES—HOLDER IN DUE COURSE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In an action on a promissory note, the plaintiff has sustained the burden of proving that he is a holder in due course, as required by Rem. & Bal. Code, § 3450, where it appears that the note for \$2,000 was given in payment of stock and was within a few days sold and indorsed to a corporation in payment of a stock subscription, and in a few weeks sold and indorsed by the corporation for \$1,900 paid in cash, neither indorsee having any notice of fraud, and that the maker himself did not learn for two months that he had been defrauded; since (1) plaintiff purchased in good faith, within Rem. & Bal. Code, § 3447, and (2) derived his title through a holder in due course, within Rem. & Bal. Code, § 3449.

SAME—HOLDER IN DUE COURSE—NOTICE OF DEFECTS—EVIDENCE—SUFFICIENCY. The fact that a note for \$2,000 was discounted \$100, and that the purchaser relied entirely on the credit of the indorser, does not impart notice of a defect in title so as to render him not a holder in due course, where it was represented that both the maker and another indorser were men of financial responsibility.

SAME—EVIDENCE AS TO GOOD FAITH—ADMISSIBILITY. In an action on a promissory note, upon an issue as to whether plaintiff was a

<sup>1</sup>Reported in 124 Pac. 907.

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holder in due course, what the maker would have said if asked whether he had a defense to the note, is immaterial, where there was nothing to put the plaintiff upon inquiry.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 9, 1911, upon findings in favor of the plaintiff, in an action on a promissory note, upon a trial to the court. Affirmed.

*Ballinger, Battle, Hulbert & Shorts*, for appellant.

*Douglas, Lane & Douglas*, for respondent.

Gose, J.—This is a suit by an indorsee upon a promissory note. The defense interposed is that the note was obtained by means of fraudulent representations made by the payee. There was a judgment for the plaintiff. The defendant prosecutes the appeal.

The note was drawn July 5, 1910, for \$2,000, in favor of one Blake, payable one year after date. The court found that, within a week after its execution, the payee sold and indorsed it to the American Mortgage & Guaranty Company, a corporation, in payment of a subscription which he had made to the capital stock of that corporation; that on July 28, following, the corporation sold and indorsed it to the respondent for the sum of \$1,900, which he then paid, and that neither indorsee had notice that there was any defense to the note or that any defense was claimed against the note, and that neither thereof had any knowledge of such facts that his action in taking the instrument amounted to bad faith, and that each thereof took it in good faith and became a holder in due course.

The appellant challenges the correctness of these findings, but we think they are abundantly supported by the evidence. The law of the case is controlled by our negotiable instruments act, and by the construction which we have heretofore given it. The applicable provisions of the act are as follows:

“The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the

instrument . . . by fraud . . . or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." Rem. & Bal. Code, § 3446.

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts, that his action in taking the instrument amounted to bad faith." Id., § 3447.

"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defense as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Id., § 3449.

"Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course . . ." Id., § 3450.

The court made no finding as to whether the transaction had its origin in fraud. Assuming however, without deciding the question, that the note was obtained by means of fraudulent representations made by the payee, the respondent is entitled to recover on either of two grounds, (1) he purchased from a holder in due course, and (2) he is a holder in due course. Upon the assumption that the title of Blake was defective under the provisions of Rem. & Bal. Code, § 3450, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801; *Cedar Rapids Nat. Bank v. Myhre Brothers*, 57 Wash. 596, 107 Pac. 518; *City Nat. Bank v. Mason*, 58 Wash. 492, 108 Pac. 1071.

The evidence shows that Blake, the payee, sold and in-

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dorsed the note to the American Mortgage & Guaranty Company, a corporation, a few days after its execution, in payment of his subscription for stock in that corporation. It was informed that the note represented the balance of the purchase price of one-half the capital stock of another corporation, but it had no notice or knowledge that there was fraud in the transaction. The appellant himself did not at that time know that he had been overreached in the sale of the stock. He alleges in his answer that, long after the delivery of the note and within the past few months, he learned that the assets of the corporation whose stock he had bought were much less than Blake represented. His testimony is that he learned, about sixty days after he made the note, that he had been defrauded. It is familiar law that stock in a corporation may be paid for in money or property taken in good faith at a fair and reasonable valuation. 10 Cyc. 471-2; 1 Cook, Stock & Stockholders (3d ed.), § 18. It is clear from the evidence that the respondent's immediate indorser was a holder in good faith. Rem. & Bal. Code, § 3447; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102; *Scandinavian American Bank v. Appleton*, 63 Wash. 203, 115 Pac. 109.

The evidence shows that the respondent paid \$1,900 for the note. It is argued that he is not a holder in good faith in that the discount was sufficient to put him upon inquiry; and in this, that he relied solely upon the credit of his immediate indorser. The discount is not so great as to impart notice of a defect in the title to the note, and the evidence shows that, when he purchased it, it was represented to him that both the maker and first indorser were men of financial responsibility. The record is barren of evidence of either a wilful ignorance or a guilty knowledge upon the part of the respondent or his immediate indorser.

The appellant predicates error upon the ruling of the court in sustaining an objection to a question propounded to him by his counsel; which, in effect, is what he would have

said if he had been asked whether he had a defense to the note or whether he expected to pay it. Aside from the fact that the element of time is absent from the question, it was clearly incompetent. A purchaser of a negotiable instrument is not required to seek the party who puts the paper afloat and ascertain from him the nature of the transaction, in order to avert the imputation of bad faith. To so hold would effectually destroy the passing of negotiable paper. The true criterion is, Has the holder exercised good faith? *Scandinavian American Bank v. Johnston, supra.*

Upon both of the grounds stated, the respondent is entitled to an affirmance of the judgment, and it is so ordered.

PARKER, CROW, and CHADWICK, JJ., concur.

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[No. 10400. Department One. July 16, 1912.]

DEXTER HORTON NATIONAL BANK OF SEATTLE, *Appellant*, v.  
DAVID MCKENZIE *et al.*, *Respondents*.<sup>1</sup>

TAXATION—ASSESSMENT—NATIONAL BANK STOCK—DEDUCTION—REAL PROPERTY—WHAT CONSTITUTES—BUILDING INVESTMENT BONDS. Business property investment bonds held by a national bank are real estate, within the meaning of Rem. & Bal. Code, § 9134, requiring the deduction from the assessed value of national bank stock of the assessed value of the real estate belonging to the bank, where such bonds, issued by a trust company in a sum equal to the alleged value of a specified tract of land, each represented and conveyed to the holder, one of the "units" in the land created by a deed of trust, under a scheme devised by the trust company to enable persons to invest small amounts in high priced business property, the trust deed requiring the trust company to pay over to the bondholders certain profits and surplus dividends, together with a share of the net income, and finally to sell the property and distribute the proceeds among the bondholders, the only interest in the land retained by the trust company being a prospective right to share in the net income and in the surplus in the ultimate sale price above the face value of the bonds; especially in view of the presumption against a legislative intent to authorize double taxation impliedly pro-

<sup>1</sup>Reported in 124 Pac. 915.



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hibited by Const., art. 7, § 2, and in view of Rem. & Bal. Code, § 9092, defining real property for the purposes of taxation to include all rights and privileges thereto belonging or in any way appertaining.

**SAME—REAL ESTATE HELD BY BANK—PRESUMPTIONS.** In the absence of any showing, it will be presumed that a national bank legally acquired its real estate the assessed value of which it seeks to have deducted from the assessed value of its capital stock.

**APPEAL—DECISION—REMAND.** Where, upon reversing the action of the board of equalization in refusing to deduct the assessed value of real estate from the assessed value of national bank stock, the board has adjourned and been dissolved, and the county treasurer has the tax rolls, the supreme court will order the clerical correction of the rolls, where nothing else is required to protect appellant's rights.

Appeal from a judgment of the superior court for King county, Myers, J., entered April 8, 1912, affirming the action of the board of equalization in refusing to reduce an assessment, after a hearing on certiorari. Reversed.

*Peters & Powell*, for appellant.

*John F. Murphy* and *M. H. Ingersoll*, for respondents.

**PARKER, J.**—The Dexter Horton National Bank, of Seattle, deeming itself aggrieved by the action of the board of equalization for King county, for the year 1911, in denying its application to reduce the assessment of that year, made by the county assessor upon its shares of capital stock by deducting therefrom the assessed value of real estate claimed to be owned by it, sought by writ of certiorari to have the action of the board of equalization reviewed and corrected by the superior court for King county. Upon the return of the writ, a trial was had in that court, resulting in a judgment denying the relief prayed for by the bank, and affirming the action of the board of equalization. From that judgment, the bank has appealed to this court.

The principal question here involved is, Is the property, the assessed value of which appellant seeks to have deducted from the value of its capital stock for purposes of taxation,

real estate within the meaning of § 9134, Rem. & Bal. Code, which provides as follows:

“All the shares of stock in banks whether of issue or not, existing by authority of the United States or of the state, and located within the state, shall be assessed to the owners thereof in the cities or towns, where such banks are located, and not elsewhere, in the assessment of all state, county and municipal taxes imposed and levied in such place whether such owner is a resident of said city or town or not; all such shares shall be assessed at their full and fair value in money on the first day of March in each year, first deducting therefrom the proportionate part of the assessed value of the real estate belonging to the bank.”

In view of the fact that, under our system of taxation, real estate belonging to banks is assessed and taxed separate and apart from their other property, just as real estate is assessed and taxed when belonging to other persons or corporations, it is manifest that the purpose of this law is to avoid what would be in effect double taxation of their real estate, by deducting the value of such real estate from the value of their other property when estimating the value of their capital stock for the purpose of taxation, since the taxing of the property of a corporation and the taxing of its capital stock in addition thereto would be in effect double taxation. *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *Stroh v. Detroit*, 131 Mich. 109, 90 N. W. 1029.

From the provisions of Rem. & Bal. Code, § 9134, above quoted, and of § 9133, preceding, relating to the assessment of corporate property, it would seem that the assessing of the capital stock of banks in this manner is intended to be in lieu of taxation upon their personal property, in view of the legal presumption of legislative intent to avoid double taxation. However that may be as to state banks, the state has no power to tax national banks except to tax their real estate and their shares of stock, this being the only concession made by the national government to the states upon that subject.

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37 Cyc. 830; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664; *Pullman State Bank v. Manring*, 18 Wash. 250, 51 Pac. 464.

The material facts bearing upon the question of the nature of the property owned by appellant, and claimed by it to be real property, the assessed value of which it claims should be deducted from the value of its capital stock, are not in dispute, and may be summarized as follows: The Trustee Company, a domestic corporation of Seattle, has devised a plan of investment in real estate by which persons may invest small amounts in high priced business property. This plan and the rights of investors thereunder are evidenced by a deed of trust, made by the trustee company to the Washington Trust Company of Seattle, a domestic corporation, conveying to that company in trust, lot 5, in block 1, of David S. Maynard's plat of Seattle; and also by certain instruments of writing, the form of which is prescribed by the terms of the trust deed, called "Business Property Investment Bonds," issued and delivered by the trustee company to the investors as evidence of their rights under the trust deed. It so happens that appellant is the sole owner of all of these so-called investment bonds, which represent the entire investment in the trust property. This fact is probably not material to the principle here involved, but will be found material to the question of the assessable value of appellant's interest in the trust property. Whether or not the interest of appellant in that property thus represented is real estate, within the meaning of the revenue statute above quoted, is the main problem for our solution here. The trust deed specifies in considerable detail the respective obligations and rights of the Washington Trust Company, the Trustee Company, and the prospective investors. The following provisions thereof, we think, will sufficiently show the nature of those obligations and rights to enable us to determine whether the interest of appellant in the trust property is real or personal for the purpose of taxation.

"The Trustee Company, being the owner of the hereinafter described real estate, hereby conveys said real estate, makes disposition and reservations, binds itself by covenants, declares and imposes trusts, and saves and grants rights, interests and powers as follows, that is to say:

"In consideration of the sum of One Dollar (\$1.00) and for the purpose of creating a Trust to sell the property hereinafter described and apply the proceeds in accordance with this Deed of Trust, and for the purpose of creating Units to represent income and proceeds of said property as herein set forth, and for the purpose of securing the performance and accomplishment of all and singular the things mentioned herein to be done or accomplished as herein set forth, The Trustee Company does by these presents grant, bargain, sell, convey and confirm unto the Washington Trust Company and to its successors and assigns, in trust, the following described real estate, . . . said property being also designated as Trustee Property No. 5, . . .

"The Trustee Company does by this Deed of Trust create two hundred and fifty (250) equal Units in said property representing income and proceeds thereof as herein set forth, and has, under this Deed of Trust, duly issued, and the Washington Trust Company has duly certified two hundred and fifty (250) Business Property Investment-Bonds, each representing one of said Units, which Investment-Bonds bear even date herewith (with coupons attached thereto, covering a period of five years from this date), which Investment-Bonds and coupons are substantially in the following terms, to wit:

" 'State of Washington. Investment Bond. No.———

" 'The Trustee Company Business Property Investment-Bond.

" 'Trustee Property No. 5.

" 'Total Number of Units Outstanding 250.

" 'The Trustee Company, for value received, hereby sells and conveys to the holder hereof one of the Units created by the hereinafter mentioned deed of trust in the following property and appurtenances thereof, to wit: . . .

" 'The Trustee Company hereby agrees to collect and pay over, to the holder hereof, the rental dividends accruing from said property to said Unit under the terms of said deed of trust, to wit:

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“ ‘1st. Quarterly Dividends out of net income up to Fifty Dollars per annum per unit . . . .

“ ‘2nd. Annual Surplus Dividends consisting of its portion of net income in excess of such quarterly dividends, . . .

“ ‘The holder hereof is also entitled to receive net proceeds of final sale of said property up to One Thousand Dollars (\$1,000) for the Unit represented hereby, and also its proportion of surplus proceeds as set forth in said deed of trust. . . .

“ ‘This Investment-Bond shall pass by delivery unless it has been registered in the name of the holder by entry in the books of The Trustee Company or of a duly qualified registry agent and by authorized notation hereon. . . .

“ ‘The Trustee Company further agrees to manage and care for said property, to keep accounts, to make reports thereon and to perform other duties as set forth in said deed of trust.

“ ‘In Witness Whereof, The Trustee Company has caused this Investment-Bond to be signed by its President, attested by its Secretary, and its corporate seal to be hereto affixed, . . . .

“ ‘The Trustee Company, by \_\_\_\_\_ President.

“ ‘Attest: \_\_\_\_\_ Secretary.’

. . . . .

“ ‘It [Trustee Company] will collect all rents and earnings of said property and distribute and pay the same as received by it, for each fiscal year ending November 30th, in the following order of priority, to wit:

“ ‘(a) In payment of insurance, taxes, special assessments, operating expenses and repairs.

“ ‘(b) In payment of dividends up to \$12.50 per quarter on each Unit outstanding hereunder, . . . .

“ ‘(c) All net income remaining after the above payments are made to be distributed on the 10th day of December of each year as a surplus dividend, as follows:

“ ‘Two-thirds (2-3) thereof to the Owners of the Units then outstanding, pro rata, and the other one-third (1-3) to The Trustee Company. . . .

“ ‘The term ‘Operating Expenses’ in this instrument shall not include any compensation to The Trustee Company for its services. . . .

“ ‘The owners of registered Investment-Bonds representing

not less than 67 per cent of the Units then outstanding hereunder, may at any time direct the Washington Trust Company and The Trustee Company to sell said property . . . .

"This Deed of Trust is made and accepted as a paramount trust and requirement that (unless said property shall have been sooner sold and conveyed as above provided) The Washington Trust Company must sell the property as an entirety in one lot or parcel prior to the termination of the existence of The Trustee Company, but not more than one year prior thereto, for such price, upon such terms and in such manner as said Washington Trust Company shall deem best, such powers to be exercised by the Washington Trust Company alone. . . . .

"The proceeds of any sale hereunder shall be by the Washington Trust Company distributed upon the written order of The Trustee Company in the following order of priority, to wit:

"(a) In payment of unpaid taxes, operating expenses and charges upon said property, if any, and the expenses of sale and conveyance;

"(b) In payment pro rata upon all Investment-Bonds outstanding hereunder, up to \$1,000 per Unit;

"(c) All of such proceeds remaining after the above payments have been made, to be distributed as an increase-value dividend, as follows: Two-thirds (2-3) thereof to the Investment-Bond Owners pro rata, and the other one-third (1-3) thereof to The Trustee Company. . . . .

"The owners of registered Investment-Bonds, representing not less than 75 per cent of the Units at any time outstanding hereunder, may, at their option, remove the Washington Trust Company and appoint a successor as follows: . . . .

"The owners of registered Investment-Bonds, representing not less than 67 per cent of the Units at any time outstanding hereunder may, at their option, remove The Trustee Company and appoint a successor as follows: . . . ."

It is manifest from these provisions of the trust deed that this joint enterprise has to do with nothing whatever but the owning, managing, receiving the income from, and eventually selling, this particular piece of real estate; first, to the profit of the owners of the units; and second, to the profit of the Trustee Company; the interest of the latter being only a

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prospective interest in surplus dividends and surplus in the ultimate sale price above \$250,000. This constitutes the entire business of the enterprise. The interest of the unit owners is not something apart from an interest in or ownership of the property itself, like that of a stockholder in a corporation. They have an interest in this particular piece of real estate, which constitutes the whole value of the units held by the investors. The very words of the so-called investment bonds conveys to the holder, "one of the units created by the . . . deed of trust in the following property and appurtenances thereto," followed by a specific description of this real estate. The owners of 67 per cent of the units have power to direct a sale of the property, cause distribution of the proceeds, and bring the trust to an end. The owners of 75 per cent of the units have power to remove the Washington Trust Company as trustee. And 67 per cent of the owners of the units have power to remove the Trustee Company from the management of the property.

We have already noticed that the assessment and taxation of this trust real property and the taxing of the units as personal property in the hands of their owners would be, in effect, double taxation. It is of course manifest that, if appellant cannot secure the reduction of the assessed value of its capital stock by having deducted therefrom the assessed value of the units it owns in this trust property, the effect will be the same as a taxing of both the real property and those units separately, and result in double taxation. While this court has held that duplicate or double taxation will not of itself render such taxation void as being in conflict with our constitution (*Pacific Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936), yet the rule has been recognized and followed by this court, which seems to be universal, that the legislative intent to authorize double taxation must plainly appear before it will be permitted by the courts. The manifest injustice of such taxation, in view of the fact that

our system is based upon taxation of property in proportion to value, and in view of our constitutional requirement of uniform taxation, furnishes unusually strong reasons in this state for our holding to this rule of presumption against legislative intent to authorize double taxation. *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261; *Lewiston Water & Power Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 96 Pac. 1047, 19 L. R. A. (N. S.) 707.

In the text of 27 Am. & Eng. Ency. Law (2d ed.), p. 948, the rule is stated thus:

"Double taxation is never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all, and if property is taxed once in one way it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition."

This is quite in keeping with the spirit of our constitution, which provides in art. 7, § 2, "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, . . . ." This is but little short of a prohibition against double or duplicate taxation. It is, at least, an admonition by the people to the legislature to avoid such taxation as far as possible, which we must presume the legislature has done. Our revenue laws define real property for the purpose of taxation in Rem. & Bal. Code, § 9092, as follows:

"Real property for the purposes of taxation shall be construed to include the land itself, whether laid out in town lots or otherwise, and all buildings, structures and improvements, or other fixtures of whatsoever kind, thereon, and all rights and privileges thereto belonging, or in anywise appertaining, . . . ."

We cannot escape the conclusion that the units representing interests in this trust property under the terms of this



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deed of trust constitute "rights and privileges thereto belonging" and "appertaining," using the language of § 9092. It follows that appellant is entitled to have deducted from the total value of its capital stock the assessed value of its interest represented by the units held by it in the trust real estate, that real estate having been already separately taxed.

By the conceded facts, it is not difficult to determine the assessed value of appellant's interest in the trust real estate. We have seen that appellant happens to own all of the units representing the entire trust property. That property was assessed at \$120,150, and of course taxes, by this time, have either been paid or will have to be paid upon that property computed upon that assessment. It is suggested that the trustee company also has an interest in the trust property of a similar nature to that of appellant, and that this may lessen appellant's interest therein. A time may come when this will be true; but it appears from the trust deed, as we have seen, that the interests of the trustee company is junior and inferior to that of appellant as owner of the units, and that the trustee company has only a prospective interest in the possible surplus of the future sale of the property if sold for more than \$250,000; since the owners of 250 units are first to receive the proceeds of such sale up to \$1,000 per unit. Assuming that the assessed value of \$120,150 put upon the trust property by the assessor was fair, it is manifest that the value of that property has not yet reached the point where it can be said that the present interest of the trustee company therein is of any value. It is not claimed that the net income therefrom produces any surplus in dividends which the trustee company would be entitled to beyond what the unit owner, the appellant at this time, is entitled to; so the trustee company apparently has no present interest by reason of surplus dividends. Of course, when we refer to present interest, we mean as of the date of the making of the assessment; since the conditions then existing are determinative of this controversy. The capital stock of appellant was

assessed at \$622,800 without any deduction therefrom on account of real estate owned by it. We conclude that appellant was entitled to have deducted from that assessed valuation the \$120,150 assessed as the value of trust real property here involved, leaving the assessable value of appellant's capital stock at \$502,650; and to have the taxes computed upon its capital stock accordingly. This will result in the payment of taxes upon all of appellant's assessable property, including its capital stock, and avoids double taxation. Neither the law nor the commonly recognized principles of fair dealing demands more than this.

Counsel for respondents place their principal reliance upon the decision *In re Jones' Estate*, 172 N. Y. 575, 65 N. E. 570, where it was held that shares of stock in a joint stock association were taxable as personal property under the laws of New York. We think, however, that a careful reading of that and other New York decisions will show that, under the statute law of New York, joint stock associations are much nearer akin to corporations than the trust here involved is, under the laws of this state. Our attention has not been called to any statute law in this state defining the legal status of such associations, and we know of no such statute law. We are unable to see that the interests of the unit owners, the beneficiaries under this trust, appellant being such sole beneficiary, are taxable in addition to the real property constituting the only real value represented by such units, any more than that any other limited interest or estate in land is taxable in addition to that tax, which is, under our system of taxation, put upon the land regardless of its ownership, and enforced by a proceeding which is in substance a proceeding *in rem*, and which looks only to the land itself for payment of the tax.

Some reference is made in the briefs to the supposed manner of the acquisition of these units by appellant, and it is suggested that the right of appellant under the law to hold real estate is in a measure limited. The record is silent as

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to how the appellant acquired this interest in the trust property. Hence, we must presume that it acquired it and is holding it legally; so we give no attention to the powers and rights of appellant in that regard.

Since our conclusion calls for a reversal of the trial court, and since the board of equalization of King county for the year 1911 has long since adjourned and been dissolved by operation of law, and the tax rolls have been made up and placed in the hands of the county treasurer for collection pending this controversy, it becomes necessary for us to make such directions as will render a proper judgment effective in protecting the rights of appellant in conformity with the views expressed in this opinion. This is in effect a controversy between King county and appellant. The board of equalization for 1911 was but the representative of the county, and the county treasurer now has the tax rolls in his possession for collection as the county's representative. It is also apparent from the undisputed facts here involved that, in the protection of appellant's rights, nothing is required now but the mere clerical correction of the tax rolls in conformity with the views herein expressed. We therefore reverse the judgment of the superior court, and direct that the treasurer of King county receive from appellant in full payment of the tax upon its capital stock a sum to be computed upon an assessed valuation of \$502,650.

CROW, GOSE, and CHADWICK, JJ., concur.

[No. 10375. Department One. July 17, 1912.]

GEORGE E. HOBSON, *Respondent*, v. GEORGE L. MARSH,  
*Appellant*.<sup>1</sup>

**CORPORATIONS—STOCK—ILLEGAL ISSUE—LIABILITY TO BONA FIDE PURCHASER.** A corporation being liable to an innocent purchaser of an illegal issue of stock, the transfer of such stock to the corporation by a *bona fide* purchaser, in consideration of reimbursement of the purchase price paid, in the shape of a promissory note of the company, amounts to a surrender of the stock, in settlement of the company's liability.

**BILLS AND NOTES—CONSIDERATION—ACCOMMODATION INDORSEMENT.** Where a *bona fide* purchaser of illegally issued stock surrendered the same to the corporation in consideration of the promissory note of the company, due in three months, indorsed by another, the acceptance of the note is a settlement of the cause of action against the corporation and an extension of time for payment of the debt, and is a sufficient consideration for the note as between the payee and an accommodation indorser.

**SAME.** In such a case, that the illegal stock was retained as security for the payment of the debt, or that the stock certificate was void, does not affect the consideration for the note.

Appeal from a judgment of the superior court for Cowlitz county, McKenney, J., entered February 7, 1912, upon findings in favor of the plaintiff, in an action upon a promissory note, after a trial to the court. Affirmed.

*B. L. Hubbell*, for appellant.

*J. E. Stone* and *Shirley D. Parker*, for respondent.

Gose, J.—This is a suit upon a promissory note. The plaintiff acquired title to the note after its maturity. The defendant is an accommodation endorser for the Perth Coal Mining Company, a corporation. The defense relied on is that the note was given for fifty shares of the capital stock of the coal company; that such stock was an overissue, and void; and hence that there was no consideration for the note.

<sup>1</sup>Reported in 124 Pac. 912.

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There was a judgment for the plaintiff. The defendant prosecutes the appeal.

The note was drawn July 2, 1910, due ninety days after date, made by the Perth Coal Mining Company, a corporation, and endorsed by the appellant before delivery. The corporate name was subscribed to the note by the appellant as its vice president. The stipulated facts are, that the note was given to one Henry Muck, and endorsed by him to the respondent after its maturity; that the consideration for the note was the "transfer to the said Perth Coal Mining Company, or to the defendant herein, of a certificate of stock" issued by the coal company; that the stock was an overissue in excess of the capital stock of the corporation as prescribed by its articles of incorporation; that Muck paid \$500, the face value of the note, for the stock, "and was a *bona fide* purchaser thereof;" and that, at the time of the making of the note, both the appellant and Muck knew that the stock was an overissue. The appellant testified, that "we were all mixed up in a coal deal;" that he thought he was going to get the money for all the stockholders; that he was acting as agent for the corporation and was collecting the stock and giving notes therefor.

While the transaction is referred to in the stipulation as a transfer to the corporation or to the appellant, it is clear that it was intended to be, and was, a surrender of the stock to the corporation, the consideration being the repayment to Muck of the purchase price of the stock. An innocent purchaser of an illegal issue of stock has a right of action against the corporation for reimbursement. 10 Cyc. 373, 444; *Dreyfus Min. Co. v. Willard*, 46 Wash. 345, 89 Pac. 935. The acceptance by Muck of a note maturing in three months was, in effect, a settlement of his cause of action against the corporation and an extension of the time of payment of his demand, and was a sufficient consideration as between him and the appellant. It is familiar law that a contract which is to the advantage of one of the parties or to

the disadvantage of the other, such as the extension of the time of payment of a demand, is a sufficient consideration to support the promise of a third party.

It is further stipulated that the certificate of stock was to be held by Muck until the note had been paid. It is argued that that fact shows that there was no consideration for the note. On the contrary, it merely shows that the legal title to the certificate was to be held as security for the payment of the note. No reason is suggested, and none occurs to us, why such an arrangement was not legal between the parties to the contract.

It is further argued that the stock certificate is void, and that the sale of an absolutely void chose in action will not form any consideration for a promise. It may be conceded that the certificate is void. Const., art. 12, § 6; 87 Am. St. 847, note 1. The transaction, however, was not a sale of the stock, but a surrender to the corporation that had unlawfully issued it, and it was legally obligated to reimburse the purchaser.

The judgment is affirmed.

CROW, PARKER, and CHADWICK, JJ., concur.

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[No. 10140. Department Two. July 17, 1912.]

E. A. SHORES *et al.*, *Appellants*, v. ERNEST HUTCHINSON  
*et al.*, *Respondents*.<sup>1</sup>

CORPORATIONS—SALE OF STOCK—RESCISSION BY PURCHASER—FRAUD—EXPRESSION OF OPINION—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a rescission of the sale of stock for fraudulent representations respecting its value, notwithstanding expressions of the seller's opinion that the stock was worth what it had brought at recent sales, and statements from the books showing overvaluation of goods on hand, where it appears that the parties were dealing on equal footing, that before the deal was closed, the purchaser, with ample opportunity and actual knowledge, made his own investigation, disregarded advice of the officers, attended several meetings of the stockholders held in an endeavor to raise a large working capital, upon which every one understood the fate of the enterprise depended.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered August 30, 1911, dismissing on the merits an action for rescission, after a trial to the court. Affirmed.

*Gordon, Easterday & Askren*, for appellants.

*Bates, Peer & Peterson*, for respondents.

ELLIS, J.—This is an action by E. A. Shores and wife, against Ernest Hutchinson and wife, to set aside a transfer and conveyance by plaintiffs to the defendants of certain improved lots in the city of Tacoma, with the household furniture therein, certain timber lands in Thurston county, and certain standing timber in Jefferson county, made in exchange for three hundred twenty shares of the capital stock of Michigan Furniture Company, hereinafter called the company. The company had a capital stock of \$150,000, divided into 1,500 shares, of a par value of \$100 each. Twelve hundred and fifty-five shares, of an aggregate par value of \$125,500,

<sup>1</sup>Reported in 125 Pac. 142.

had been issued. The grounds upon which rescission is sought are alleged fraudulent representations by the defendants as to the amount and value of the assets of the corporation and as to the value of the stock, and misrepresentation and concealment as to the extent of its liabilities. A trial on the merits resulted in a dismissal of the action. The plaintiffs have appealed.

The evidence is voluminous and conflicting. No good purpose would be served by reviewing it in detail. It will suffice to say that, upon a careful consideration of the statement of facts, we are satisfied that the following facts were established by a fair preponderance of the evidence. In the latter part of January or early in February, 1911, the respondent Ernest Hutchinson, who had recently retired from the presidency and management of the company, desiring to dispose of his stock therein, placed it in the hands of the real estate firm of Fettig & Busselle for sale, advising them to call upon the appellant E. A. Shores, who, as it appears, had formerly evinced some interest in the concern. After considerable negotiation, which was conducted mainly, if not wholly, by these agents with the appellant E. A. Shores, an agreement was reached by which the three hundred and twenty shares of stock were to be transferred to the appellants in exchange for the property sought to be recovered in this action.

A contract evidencing this agreement was executed by the appellants and respondents on February 16, 1911. It provided that, if the respondents, within thirty days from the date of the contract, deliver to the appellants the three hundred and twenty shares of stock duly and regularly issued to E. A. Shores, the appellants would thereupon deliver their deeds of the property to the respondents. The respondents, at the time of the signing of the contract, delivered the stock to the appellants' attorney, and on February 18, 1911, it was transferred to the appellant E. A. Shores upon the books of the company. The stock certificate was actually delivered to Shores personally, about March 10, 1911. While he tes-



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tified in effect that he did not consider himself the owner of the stock until he delivered to respondents deeds of the property, on March 14, 1911, it is undisputed that, between the making of the contract, February 16, and the date of the delivery of the deeds to the respondents, March 14, he attended several meetings of the stockholders, and was recognized by the company as the owner of the stock. At these meetings it appears that the affairs of the company were fully discussed, and at one of them, held on March 11, 1911, a detailed statement of its financial condition was read, showing that \$30,000 was immediately required to keep the company a going concern, and the appellant E. A. Shores was then appointed as a member of a committee to devise some plan for financing and reorganizing the company. He also attended an adjourned meeting of the stockholders on March 14, 1911, before delivering the deeds, at which meeting a motion was carried to endeavor to get each stockholder to pay a 30 per cent cash assessment, or put up 50 per cent of his stock for the purpose of raising operating capital. In the latter part of February, 1911, Shores went out to the plant and had a conversation with one Bradner, the manager of the factory, in which the management, condition, and prospects of the company were discussed, and Shores then told Bradner that the company ought to have \$20,000 at once; thus showing that he then realized that the concern was in immediate need of working capital to make it pay and to preserve a value in the stock. There was also evidence that both Shores and his son visited the plant and looked over the goods and materials on hand, and that Shores and his attorney made an examination of the stock books and records of the company. While it appears that, prior to the transfer of the stock on February 18, the officers of the company declined to give Shores information and discouraged the purchase of the stock, after that time they accorded to him every opportunity to examine the books and look into the affairs of the company. There was also evidence that the then president of the company,

and certain other stockholders advised Shores not to purchase the stock. He seems to have entertained the idea that these persons were trying to depreciate the stock in order to purchase it at a low figure themselves, and that their advice merely whetted his determination to become a stockholder.

We fail to find that either the respondent Hutchinson or his agents Fettig and Busselle made any representations as to the value of the stock or as to the affairs of the company which could have reasonably misled the appellants as to what they were trading for, or as to its worth. Shores testified that Hutchinson told him some of the stock had been sold for ninety cents a share, and that it was worth that. While it seems to be admitted that either Hutchinson or his agents did tell Shores that stock had been sold recently at that figure—which was true—Hutchinson, Busselle and Fettig all testified that no representation was made at any time by any of them as to the actual value of the stock. They testified that, at the time of the signing of the contract on February 16, 1911, Busselle told Shores that they placed no value on the stock because they did not know what it was worth, and that Shores answered in effect that he did not want any information from them, as he preferred to get his information "first handed."

Certain balance sheets and statements of bills payable came into Shores' hands pending the negotiations. He claims that these were given to him by Hutchinson as representing the actual cash valuations of the property, accounts, and debts of the company. The evidence is by no means plain that any of these were furnished to him by Hutchinson or his agents, but it is plain that some of them were secured by him at the meetings of the company which he attended. In any event, they were what they purported to be—mere statements made from the books of the company, and there was no evidence that they were not true statements of what the books showed. While some of these statements probably showed values in excess of the actual value of the goods on hand, we cannot believe, in view of the investigations shown to have been made

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by Shores and the knowledge of the actual financial condition of the company which was brought home to him prior to the closing of the transaction by the delivery of the deeds, that he was actually deceived by them or delivered his deeds on the faith of what these statements showed. It is true that the company was placed in the hands of a receiver just one month after the appellants delivered their deeds in exchange for the stock, but it seems plain that the appellants knew, or ought to have known, when the deeds were delivered, that this result would follow unless the plans then pending for reorganization and raising a working capital were successful. Every one concerned, including the appellants, knew that the fate of the enterprise depended entirely upon the raising of a large working capital. With this knowledge, the appellants closed the deal and delivered their deeds.

Even if we accord absolute verity to the appellants' testimony as to the representations alleged to have been made by Hutchinson, they must be treated, in view of the relation and situation of the parties, as mere expressions of opinion, not constituting ground for rescission. No confidential or fiduciary relation between the parties existed. They were dealing with each other at arm's length. The means of knowledge were open to the appellants. No artifice of any kind was employed to prevent them from availing themselves of these means to acquire full knowledge.

"To make representations fraudulent and therefore ground for a rescission they must be representations of material facts and not mere matters of opinion or judgment. In law one man's judgment or opinion is as good as that of another. It would be folly in a person to implicitly confide in the statements of another where both have equal means of information." Smith, Law of Fraud, p. 143, § 126.

"As a generalization from the authorities, the various conditions of fact and circumstance with respect to the question how far a party is justified in relying upon the representation made to him may be reduced to the four following cases, in the first three of which the party is not, while in the fourth he is, justified in relying upon the statements which are of-

ferred as inducements for him to enter upon certain conduct: 1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties; 4. But when the representation is concerning facts of which the party making it has, or is supposed to have, knowledge, and the other party has no such advantage, and the circumstances are not those described in the first or the second case, then it will be presumed that he relied on the statement; he is justified in doing so." Pomeroy, *Equity Jurisprudence* (3d ed.), § 892.

In the case before us, the appellants not only had the means of knowledge, but had actual knowledge of the necessitous condition of the company before finally consummating the trade. Manifestly the case does not fall within the fourth class designated by Pomeroy, so as to give ground for rescission.

It is also manifest that the appellants cannot be heard to say that they relied upon any representations made by the respondents or their agents. They entered upon an independent investigation, and there is no evidence that they were prevented from pursuing it by any act of the respondents or of their agents. In fact, if Fettig and Busselle are to be believed, when they offered to assist Shores in securing information, he declined their aid, intimating that he preferred to secure it for himself. All of this was while the contract of exchange was still executory, and before the appellants had delivered their deeds.

"If, after a representation of fact, however, positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must

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plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, and he commences or purports or professes to commence, an investigation. The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled." Pomeroy, *Equity Jurisprudence* (3d ed.), § 893.

See, also, Smith, *Law of Fraud*, § 75; 20 Cyc. 92; *Slaughter's Adm'r v. Gerson*, 80 U. S. 379. The rule announced by the foregoing authorities is exemplified in the following decisions by this court: *Washington Cent. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *English v. Grimstead*, 12 Wash. 670, 42 Pac. 121; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Opie v. Pacific Inv. Co.*, 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Romaine v. Excelsior Carbide & Gas Machine Co.*, 54 Wash. 41, 103 Pac. 32.

That we have gone as far as other courts in sustaining the right of aggrieved parties to rescind or claim relief against contracts induced by fraudulent representations, where there is evidence of abuse of some confidential or fiduciary relation, or where the parties are not upon an equal footing, or where the means of knowledge are not equally open to both, or where some reasonably sufficient artifice has been employed to prevent investigation, or where it is made evident that in any other way an unfair and unconscionable advantage has been taken of the complaining party, is demonstrated by the following and many other decisions: *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 834; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Jones v. Hawk*,

64 Wash. 171, 116 Pac. 642; *McMillen v. Hillman*, 66 Wash. 27, 118 Pac. 903.

We have, however, never gone so far as to sustain a rescission or grant other relief merely because the expectations of one of the parties have not been realized, where the parties, as here, were dealing at arm's length, where the means of knowledge were equally open to both, where an independent investigation was actually undertaken by the complainant, where no artifice was employed to prevent its prosecution, and where the evidence of the alleged fraudulent representations was contradicted by evidence which, so far as we can know, was equally credible. It is familiar law that one asserting fraud must establish it by clear and convincing evidence. A careful consideration of the whole record impels us to the conclusion that the decision of the trial court is sustained by a preponderance of the evidence.

The judgment is affirmed.

MOUNT and MORRIS, JJ., concur.

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[No. 10303. Department Two. July 17, 1912.]

KNICKERBOCKER COMPANY, *Appellant*, v. THE CITY OF  
SEATTLE, *Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—BRIDGES—POWER TO CONSTRUCT. Rem. & Bal. Code, § 7507, authorizing a city to open, establish, grade and plank streets and other public places, and to construct and keep in repair bridges, authorizes the city to construct a bridge or elevated roadway.

SAME—BRIDGES—WHAT CONSTITUTES. An elevated roadway resting on mudsills and stringers, built to bring the street up to the established grade is not a bridge.

SAME—NATURE OF IMPROVEMENT—TEMPORARY OR PERMANENT. An elevated roadway resting on mudsills, piles and stringers, is a "permanent" improvement for which the property may be assessed, where it was intended to use the same as long as it would last,

<sup>1</sup>Reported in 124 Pac. 922.

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although the city contemplated the making of a permanent fill later, and did in fact commence filling in underneath the structure shortly after it was built.

**SAME—IMPROVEMENTS—BENEFIT—OFFSET OF DAMAGES.** Damage to abutting property by reason of previous improvements cannot be offset against an assessment for benefits from a later improvement.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 19, 1911, confirming an assessment for a local improvement, upon appeal from the city council. Affirmed.

*Charles A. Riddle*, for appellant.

*James E. Bradford* and *J. Richard Dillon*, for respondent.

FULLERTON, J.—The appellant owns real property situated in the city of Seattle which abuts upon Maynard avenue therein. By Ordinance No. 19,235, the city caused that part of Maynard avenue in front of and in the vicinity of the appellant's property to be improved at the expense of the property benefited, and caused a part of the cost thereof to be assessed upon appellant's property as property so benefited. The appellant protested before the city council at the proper time against the assessment, but the protest was overruled by that body and the assessment allowed to stand. The appellant thereupon appealed from the order to the superior court, where the assessment was again confirmed. The present appeal was taken from the judgment and order of the superior court.

The character of the improvement is what the engineer in charge denominated bridge work. It consisted of an elevated roadway, constructed in part upon posts resting on mudsills, and in part upon piles driven in the ground; the posts and piles being surmounted by capping or stringers, and the whole overlaid with planks.

The record discloses that the appellant's lots have been affected by some four other regrade and improvement projects, all had prior to the improvement in question. In the first of these, known as Jackson street regrade, a grade was

established in front of the appellant's property at 34.50 feet above the city datum line. The second raised this grade to 40.09 above the datum line. The third provided for an improvement known as the sanitary fill, by which the lots of the appellant were required to be filled up to a certain grade so that proper sewerage connections could be made therewith; the natural grade of the lots being so low that sewerage could not be made to flow therefrom without the use of pumps. The fourth provided for filling the street underneath the bridge work with earth up to the 40.09 foot level. At the time of the Jackson street regrade, there was a two-story brick building upon the appellant's property which then had a considerable rental value, and which was not entirely destroyed by that regrade. The subsequent change in the grade, together with the sanitary fill and the earth fill beneath the bridge, have so far destroyed the usefulness of the building as to require its demolition. For the injuries that were caused the property by these improvement projects, save only for the Jackson street regrade, no award was made the appellant, nor were any proceedings instituted to determine whether or not such projects caused injuries which exceeded the benefits conferred on the property by the improvements.

The appellant calls the structures which the city erected in the street a bridge, and contends that the city was without power to charge the cost thereof to the property benefited; since, as it contends, neither the city charter nor the general statutes furnish warrant or authority for constructing a bridge. But it has seemed to us that this contention is not well taken. Both the general statute (Rem. & Bal. Code, § 7507) and the charter of the city of Seattle (art. 4, § 18) provide that the city shall have power:

"Seventh. To lay out, establish, open, alter, widen, extend, grade, regrade, sidewalk, residewalk, pave, repave, plank, replank, establish grades or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and other public



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grounds, and to regulate and control the use thereof, and to vacate the same and to authorize or prohibit the use of electricity at, in or upon any of said streets or for other purposes, and to prescribe the terms and conditions upon which the same may be so used and to regulate the use thereof . . .

"Tenth. To provide for making local improvements and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof.

"Twelfth. To construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.

"Thirteenth. To determine what work shall be done or improvements made at the expense in whole or in part of the owners of the adjoining, contiguous or proximate property, or others especially benefited thereby, and to provide for the manner of making and collecting assessments therefor."

The city charter also contains the further provision, namely:

"Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole or any part of the streets, lanes, alleys, squares or places of the city to be graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, graveled or regraveled, piled or repiled, capped or recapped, and to order sidewalks, sewers, manholes, culverts, bulkheads, retaining walls, watermains, curbing and crosswalks to be constructed or repaired therein; and to order any and all work to be done which shall be necessary to complete the whole or any portion of the said streets, lanes, alleys, squares or places; and the city council may levy and collect an assessment upon all lots or parcels of land specially benefited by such improvements to defray the whole or any portion of the cost and expense thereof, which assessment shall become a first lien upon all property, liable therefor, prior and superior to all other liens and incumbrances." Charter, art. 8, § 11, subd. 1.

The statute also further provides:

"Whenever any local improvement is hereafter ordered in any incorporated city of the first class in this state, the cost of which is payable in whole or in part by an assessment upon the property abutting or proximate thereto, a like proportion of the cost of that portion of said improvement included with-

in the limits of any street intersection space or spaces, shall be included in the amount of total cost to be assessed and levied upon and collected from the property included within the local improvement district established for the purpose of providing for the cost of such local improvement. For the purposes of this and the next section, any improvement made, either upon or under the surface of any street, avenue, alley, square or other public place, the cost of which is payable, in whole or in part, by an assessment upon the property abutting or proximate thereto, shall be deemed to be a local improvement." Rem. & Bal. Code, § 7529.

The quotation first made from the statute and charter of the city would seem to confer on the city ample authority to erect the structure in controversy, even though we were to concede that the structure was in reality a bridge. See the twelfth subdivision thereof. But the structure is clearly not a bridge in the common acceptation of that term. A bridge is "a structure erected over a river or other water course, or over a chasm . . . to make a passage way from one bank to the other; anything supported at the ends which serves to keep some other thing from resting upon the object spanned . . . or which forms a platform or staging over which something passes or is conveyed;" while the present structure was merely intended to bring the surface of the street up to the established grade. It is no more a bridge proper than it would have been had the street been filled with earth to the required level and the top planked over. It was an elevated roadway; and as such, ample power is found in the sections of the city charter and statutes above quoted to authorize its construction at the expense of property benefited thereby. *Vreeland v. Tacoma*, 48 Wash. 625, 94 Pac. 192; *Smith v. Seattle*, 25 Wash. 300, 65 Pac. 612.

It is next contended that the improvement was but temporary in character, intended to serve as a roadway only until such time as an earth fill, which was carried on concurrently with the improvement, could be completed; and that the law does not permit an assessment upon property bene-

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fited to pay the cost of mere temporary improvements. But in our opinion the evidence does not warrant the conclusion that the structure was for temporary use only. It may be true that, when the structure was ordered, the city officials contemplated making a permanent fill along the line of the structure; but the evidence makes it clear that the structure was intended to constitute the roadway as long as it could be safely used for that purpose. There was no intention of substituting new materials or a new character of roadway until the use and decay rendered the particular one inadequate or unsafe. It was permanent, therefor, in the sense that it was intended for use as long as the materials of which it was composed would last, and this makes it permanent in a legal sense. It is true, the evidence shows that the city began to fill underneath and surrounding the structure with earth shortly after it was constructed, and has since practically completed the fill, rendering a rebuilding of a similar structure unnecessary, but this was done at the expense of a public service corporation which had acquired rights in another street, not at the expense of the property benefited by the fill. However, had it been made at the expense of the city, it would not prove the first improvement to be temporary instead of permanent.

It is finally contended that the damage to the appellant's property caused by the improvement is in excess of the benefits conferred; but here again we think the evidence fails to support the contention. As we understand the witnesses, they did not testify that the particular structure caused damage to the appellant's property; but, on the contrary, testified that the damage resulting to the property was caused by the last change in the grade, and by the fills following that change of grade; that is to say, by the raise of the grade from 34.50 feet above the city datum line to 40.09 feet, the sanitary fill, and the fill underneath the bridge work. But this damage, being the result of proceedings other than the one now before us, cannot be offset against benefits con-

ferred by this proceeding. Proceedings of this sort are special and not general; hence the statutes allowing offsets and counterclaims to be pleaded in defense have no application. Such a practice would deny to the city the benefit of the provisions of its charter requiring claims for damages to be presented to its city council for allowance or rejection prior to the maintenance of an action thereon, and would so confuse and intermingle its several improvement projects as to render that means of improving streets impracticable. We find nothing in the current proceedings that successfully impeaches the assessment roll, and this is as far as we are permitted to inquire.

The judgment appealed from will stand affirmed.

ELLIS, MORRIS, and MOUNT, JJ., concur.

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[No. 10373. Department Two. July 17, 1912.]

THE STATE OF WASHINGTON, *on the Relation of A. J. Harris et al., Appellants*, v. J. LENOX WARD, *as Prosecuting Attorney etc., Respondent*.<sup>1</sup>

MANDAMUS—WHEN LIES—ORDERS OF SCHOOL SUPERINTENDENTS—QUESTIONS REVIEWABLE BY APPEAL. In mandamus proceedings to compel the prosecuting attorney to test the validity of an order of the school superintendent consolidating two school districts, the wisdom or policy of the order cannot be inquired into, where the same can be reviewed by appeal; since it is a collateral attack on the order and only its validity can be questioned.

SCHOOLS AND SCHOOL DISTRICTS—CONSOLIDATION—PETITION—REQUISITES. Rem. & Bal. Code, § 4440, authorizing the school superintendent to consolidate school districts upon the receipt of a petition signed by "five heads of families of two or more districts," requires only five signatures from the entire territory, and not the signatures of five heads of families from each district.

<sup>1</sup>Reported in 124 Pac. 913.

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Appeal from a judgment of the superior court for Yakima county, Grady, J., entered September 25, 1911, upon findings in favor of the defendant, dismissing an application for a mandamus to compel the institution of *quo warranto* proceedings. Affirmed.

*G. G. Lee* and *C. F. Bolin*, for appellants.

*Parker & Richards*, for respondent.

FULLERTON, J.—The code of public instruction of the state of Washington, in the chapter relating to the formation of consolidated school districts (Tit. III, ch. 3, art. 4, § 1; Laws 1909, p. 271; Rem. & Bal. Code, § 4440), provides that, upon the receipt of a petition signed by five heads of families of two or more adjoining districts in the same county, the county superintendent of schools may organize and establish a consolidated school district; and that in such procedure “the posting of notices, the hearing, and the appeal shall be the same as in the change of territory from one district to another.” The section relating to the change of territory from one school district to another (Tit. III, ch. 3, art. 2, § 1; Laws 1909, p. 268; Rem. & Bal. Code, § 4433), provides that “for such proposed transfer of territory the notices shall be posted and the hearing and appeal shall be the same as for the formation of a new district.” The provision relating to the posting of notices, the hearing on the petition, and the appeal in that part of the act relating to the formation of a new district are found in §§ 2 and 5 of art. 1 of the title and chapter above cited (Laws 1909, pp. 266, 267; Rem. & Bal. Code, §§ 4428, 4431), and read as follows:

“Sec. (2) The county superintendent shall give notice to the parties interested by causing notices to be posted at least twenty (20) days prior to the time appointed by him for considering said petition, in at least three of the most public places in the proposed new district, and one on the school house door of each district affected by the proposed change,

and in one of the most public places of the territory affected by the proposed change. On the day fixed in the notice, he shall proceed to hear said petition, and if he deem it advisable to grant the petition he shall make an order establishing said district and describing the boundaries thereof and shall certify his action to the board of county commissioners at their next regular meeting."

"Sec. (5) . . . He shall make a full record of all such findings and terms of adjustment and the decision of said county superintendent shall be final unless appealed from in the manner provided by law, in which case the decision of the board of county commissioners shall be final."

In February, 1911, a petition was presented to the superintendent of schools of Yakima county, praying that school districts Nos. 72 and 80 therein be consolidated into one school district in the manner prescribed by law. The petition was signed by three heads of families, together with their wives, residing in school district No. 72, and by four persons residing in school district No. 80, three of whom are conceded to be heads of families. On receipt of the petition, the county superintendent of schools appointed March 21, 1911, as the time for hearing the same, and caused notices thereof to be issued bearing date as of February 27, 1911, which were subsequently posted as required by law. The hearing was had on the day fixed, at which time the county superintendent found it to be to the best interests of all concerned to consolidate the districts, and entered an order consolidating the same under the name of school district No. 94, Yakima county, and thereafter certified his order to the board of county commissioners of Yakima county as required by statute. No appeal was taken by any one from the order so entered.

Some months after the order of consolidation had been entered, and after the right of appeal therefrom had expired, certain residents and taxpayers residing in that part of the consolidated district which was formerly district No. 72 requested the prosecuting attorney of Yakima county to

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file an information in the nature of *quo warranto*, against the county school superintendent, the county treasurer of Yakima county, and certain other persons acting as directors of the purported consolidated school district, to inquire into the legality of the proceedings by which the consolidated district was organized. The prosecuting attorney refused to institute the proceedings, and the present proceeding in mandamus was brought in the superior court of Yakima county to compel him so to do. The superior court refused to grant the application for the writ, and this appeal is from the judgment entered embodying the order so made.

In setting forth their grievances against the order of consolidation entered by the county school superintendent, the petitioners have included many that go only to the wisdom and policy of the order. But it is manifest that these raise questions that cannot be considered by the court in this form of procedure. The statute provides for an appeal from the order of the county superintendent, and for any mere error of judgment committed by him concerning the wisdom or policy of the order, that remedy must be pursued. This procedure is in the nature of a collateral attack upon the order, and only its validity can be inquired into therein.

The record suggests but two questions going to the validity of the order, namely, that the petitions upon which the county superintendent acted did not comply with the statute, and hence were insufficient to confer jurisdiction to make the order of consolidation; and second, that the notices were not posted for the statutory time.

The objection to the petition is that it was not signed by the required number of heads of families. It is contended that there must be presented to the county superintendent of schools a petition signed by five heads of families from each of the several school districts it is proposed to consolidate before that officer has authority to act in the premises. We do not so read the statute. Its language is: "Upon receipt of a petition signed by five heads of families of two or more

adjoining districts in the same county, the county superintendent may organize and establish a consolidated school district." Plainly, this requires but five heads of families from the territory it is proposed to organize into a consolidated district, not five heads of families from each separate entity of which the consolidated district is to be composed. *School Dist. No. 74 v. Board of Com'rs*, 9 S. D. 291, 68 N. W. 746; *Parr v. Miller*, 146 Ill. 596, 35 N. E. 230; *People ex rel. Sackmann v. Keechler*, 194 Ill. 235, 62 N. E. 525; *People v. Rhodes*, 109 Ill. App. 110.

The objection that the notices of the hearing on the petition were not posted for the required time seems to us to be against the weight of the evidence. The statute does not provide that the record showing the proofs of the posting shall be preserved by the county superintendent of schools as a part of his records, and the court below permitted the parties to introduce oral evidence upon the question, and found therefrom that the notices had been posted for the required time. This evidence is in the record, and while contradictory, we think it preponderates in favor of the trial court's finding.

There is no error in the record, and the judgment appealed from will stand affirmed.

ELLIS, MORRIS, and MOUNT, JJ., concur.



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Opinion Per PARKER, J.

[No. 10195. Department One. July 18, 1912.]

JOHN A. ULRICKSON, *Respondent*, v. JOHN A. SODERBERG  
*et al.*, *Appellants*.<sup>1</sup>

MASTER AND SERVANT—INJURIES—NEGLIGENCE—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE. An employer is responsible for injuries to his servant, a derrickman, caused by the fall of a boom through an insufficient number of coils of cable on the drum, where his failure to furnish sufficient cable was as much the proximate cause of the accident as the negligence of the engineer in allowing too much cable to run off the drum.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$6,000 for injuries sustained by a derrickman thirty-two years of age, earning \$3.50 per day is not excessive, where his arm was broken in several places, and its use permanently impaired, his shoulder was dislocated, he was in the hospital thirteen weeks, and had to undergo four operations, incurring an expense of \$650 and losing \$1,000 in wages up to the time of the trial.

Appeal from a judgment of the superior court for King county, Main, J., entered July 1, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a stone quarry. Affirmed.

*Peters & Powell*, for appellants.

*Beeler & Sullivan*, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff alleges resulted to him from the negligent operation of a derrick in the defendants' stone quarry where he was employed as a derrickman. A trial before the court and a jury resulted in a verdict and judgment against the defendants, from which they have appealed.

There was evidence introduced upon the trial sufficient to warrant the jury in concluding that the following facts were established. On July 27, 1910, and for some time prior

<sup>1</sup>Reported in 124 Pac. 909.

thereto, respondent was employed as a derrickman by appellants in their stone quarry. His duty was to fasten the grab hooks, which were hanging from the outer end of the boom of the derrick, to the stone, for hoisting and removing them from the quarry. The derrick consisted of a mast, about 75 feet high, from 12 to 18 inches in diameter, and a boom of nearly the same size, about 65 feet long, extending out from the foot of the mast. It was operated in the usual manner by wire cables running through pulley blocks to a donkey engine, a hundred feet or more distant from the derrick, and out of view of respondent from where he was required to work. One cable ran from a drum at the engine through pulley blocks at the foot and top of the mast to the outer end of the boom, and was for the purpose of raising and lowering the boom. Another cable ran from another drum at the engine through pulley blocks at the foot and top of the mast and at the outer end of the boom to the grab hooks, which hung from the outer end of the boom, and was for the purpose of hoisting the stone. The cable used for raising and lowering the boom was attached to the edge of the drum at the engine, where it commenced to coil around the drum by a clamp which was not strong enough to hold the cable when the weight of the boom was hanging upon it, unless there were several coils of the cable around the drum so that the friction therefrom rendered its hold upon the drum sufficient. It is not safe to have less than four or five coils around the drum at any time while the weight of the boom is upon the cable, otherwise the cable is likely to slip and break its fastening upon the drum and cause the boom to fall. To render the appliance entirely safe, it is necessary to have the cable of sufficient length so that there will be four or five coils around the drum when the boom is resting upon the ground. About July 4, 1910, the derrick was moved some sixty feet farther into the quarry away from the engine, and the length of the cable was not then increased sufficient to leave four or five coils around the drum, unless the outer end

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of the boom be held at a distance of twenty feet or more above the ground. Respondent had no knowledge of the length of the cable and had nothing to do with the machinery.

On July 27, 1910, while respondent was performing his usual duties as derrickman, the grab hooks had been lowered to the ground for the purpose of hoisting stone, when he proceeded to make them fast to a stone. At that time, in obedience to a signal from the head derrickman, the engineer lowered the boom, and in doing so allowed the boom cable to run off the drum until there was only one coil left upon it, when he applied the brake, stopping the drum. The strain upon the cable broke its fastening upon the drum, and it slipped off, causing the boom to fall upon respondent, resulting in the injuries for which he claims damages in this action. After the removing of the derrick farther away from the engine, thus rendering the cable too short, the attention of appellants' foreman was called to the danger incident to the operation of the derrick without a longer cable. It is conceded that he recognized this danger, as the engineer also did, though they concluded that they could safely operate it in this condition temporarily, by taking care not to lower the boom too far so as to allow too much of the cable to run off of the drum.

It is contended that the negligence of the engineer, in allowing too much of the cable to run off of the drum before stopping it, was the proximate cause of the respondent's injury; that the engineer was a fellow servant with respondent, and therefore appellants are not liable. If this constituted the only negligence which the evidence tended to show, we might be called upon to determine whether or not the rules applicable to fellow servants would relieve appellants from liability. But it is manifest from the evidence that the jury were fully warranted in believing that the want of a cable of sufficient length was as much a proximate and efficient cause of the injury of respondent as the negligence of the engineer. The evidence was clearly sufficient to warrant the jury in

finding that appellants were negligent in failing to furnish a cable of sufficient length. It seems plain to us that the verdict can be supported upon the theory that the concurring negligence of both the engineer and appellants caused respondent's injury. This makes it immaterial whether the engineer and respondent were fellow servants or not. The rule of liability under such circumstances is stated in 2 Labatt, Master and Servant, at § 814 as follows: "It is well settled that a servant's action is not barred by the defense of common employment, where a breach of duty on the master's part contributed as a proximate cause to the injury." This rule was recognized by this court in *Costa v. Pacific Coast Co.*, 26 Wash. 138, 66 Pac. 398.

It is next contended that the verdict of the jury was so manifestly excessive as to indicate passion and prejudice on the part of the jury, and that respondent should be required to accept a less sum or submit to a new trial. The award of the jury was for \$6,000. Respondent's injuries consisted of the breaking of his right forearm in several places, both bones being broken entirely off, his shoulder being dislocated, and he being otherwise severely bruised. He was confined to the hospital thirteen weeks. In the setting of the fractures, it became necessary for the doctors to perform upon him during that period not less than four operations, each of which required the administering to him of an anaesthetic, besides one or two other operations not so severe. The use of his arm is impaired to a considerable extent, probably permanently, though the doctors do not agree upon that. The rotary motion of the forearm and wrist is restricted to about ten per cent of normal. That may, however, be improved in time to twenty or even forty per cent, though none of the doctors claim that it will ever be more efficient than that. He incurred hospital and doctors' bills amounting to approximately \$650. He has lost in wages, computed at his usual earning capacity up to the time of trial, approximately \$1,000, so that he has been awarded for his pain and suffer-

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ing and impaired use of his right arm approximately \$4,250. His wages at the time of injury were \$3.50 per day, which was apparently no more than his average earning capacity. He was thirty-two years old when injured, and was dependent upon physical work for a livelihood. While the award may seem large, we are not able to say that it was so excessive as to warrant our interference therewith on the ground of the jury's prejudice.

The judgment is affirmed.

CROW, CHADWICK, and GOSE, JJ., concur.

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[No. 10202. Department One. July 18, 1912.]

**A. HAMBACH, *Respondent*, v. H. B. WARD *et al.*, *Appellants*.<sup>1</sup>**

**STATUTES—TITLE AND SUBJECT.** The object of an act rendering municipal corporations liable to laborers and materialmen if the city fail to take a bond from contractors on public work, is sufficiently disclosed by the title, an act requiring bonds from contractors on public work, conditioned to pay laborers and materialmen.

**MUNICIPAL CORPORATIONS—CONTRACTS—PUBLIC WORK—BONDS—LIABILITY FOR LABOR AND MATERIAL.** The fact that city officers did not have authority to make a contract for a public work, will not avoid the liability of the city to laborers and materialmen for the failure of the city to take a bond from the contractors, as provided by Rem. & Bal. Code, § 1159, where the contractor was engaged in a public work such as the officers had authority to carry on, with their knowledge and consent, and the city had received the benefit of the work.

**SAME—AMOUNT OF LIABILITY—QUANTUM MERUIT.** Rem. & Bal. Code, § 1159, rendering a city liable to laborers and materialmen on public work, if it fails to take a bond from the contractor, creates a liability only upon a *quantum meruit* and not for the "agreed" price of the labor or material.

**SAME—NATURE OF LIABILITY—PENAL OR REMEDIAL.** Rem. & Bal. Code, § 1159, rendering a city liable for labor and materials on pub-

<sup>1</sup>Reported in 125 Pac. 140.

lic work, if it fails to take a bond from the contractor, is remedial and not penal in its nature, not differing from statutes for mechanics' liens.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered October 21, 1911, upon findings in favor of the plaintiff, in an action for materials furnished a contractor on public work. Affirmed.

*S. J. White*, for appellants.

*Peterson & Macbride*, for respondent.

Gose, J.—This action was brought under the provisions of the statute, Laws 1909, p. 716, § 1 (Rem. & Bal. Code, § 1159). It is alleged in the complaint that the plaintiff and his assignors furnished material for and performed labor upon the city hall and library building in the city of Edmonds, a city of the third class, at the instance of the defendant Ward; that Ward erected the building under a contract with the city, and that the city failed to take a bond as required by the statute. The answer admits that Ward erected the building, and that the building is the property of the city; but denies that the city entered into a contract with him for its construction. There was a judgment for the plaintiff against the city, and it has appealed.

The appellants' first contention is that the title of the act is not sufficiently broad to embrace the obligation which section 2 puts upon municipalities failing to take a bond. The title of the act is as follows:

"An act requiring bonds from contractors contracting to do public work, conditioned to pay laborers, mechanics, materialmen and others."

While the title might well have been more specific, we think it is sufficiently comprehensive to disclose the object of the act, within the meaning of the constitution. The purpose of the constitutional provision is to require the title of an act to call attention to the subject-matter of the legislation, so that one reading it may know what matter is being legislated

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upon, "and it is sufficient when it is broad enough to accomplish that purpose." *State ex rel. Zent v. Nichols*, 50 Wash. 508, 97 Pac. 728. See, also, *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771; *State v. Ames*, 47 Wash. 328, 92 Pac. 137; *State v. Merchant*, 48 Wash. 69, 92 Pac. 890; *State ex rel. McFadden v. Shorrock*, 55 Wash. 208, 104 Pac. 214; *National Surety Co. v. Bratnober Lumber Co.*, 67 Wash. 601, 122 Pac. 337; *State ex rel. School District No. 56 v. Superior Court*, ante p. 189, 124 Pac. 484.

This title was considered in the *Bratnober* case, at page 614, where we said:

"The act here involved, both in its title and body, relates only to securing claims by *contractor's bonds*, and has no reference whatever to liens. Its title we think fairly suggests all that is necessary, as to who are to be secured by such bonds in the body of the act."

A reading of these cases will disclose that this court has adopted a rule of liberal interpretation, and has declined to reject any part of an act where the title discloses its general object and is not misleading.

The contract recites that it is entered into by Ward, as the party of the first part, and the city of Edmonds, as the party of the second part, and is signed "William Keeler, Mayor, H. V. Allen, Thomas Hall, Committee." It is contended that the contract was not legally executed, and that the city did not confer upon the committee the power to enter into the contract. These questions we need not consider. The evidence shows, that the goods were furnished at their reasonable value; that they were actually used in the construction of the building; that they have not been paid for; and that the city has accepted the building and is using one floor as a city library and the other as a city hall. In the beginning, the city had an offer of a gift of \$5,000 from Mr. Carnegie, to be used in the construction of a free public library building. The offer was accepted, and the money was received

and used in the construction of the building. The building was made large enough to serve the two-fold purpose of a library and a city hall, and the \$5,000 was found to be inadequate for the double purpose. We think the words contained in the act, "shall contract with any person or corporation to do any work for the state, county or municipality," etc., have reference to the actual relation created, rather than to the strict legal relation. The city had actual knowledge, while the building was in course of construction, that Ward, whether empowered to do so or not, was assuming to represent it; and after the building was completed, it accepted it and has since occupied it. It is not contended that the city did not have the power to enter into the contract, but, the contention is that the contract was irregularly executed. The obligations flowing from a power irregularly exercised by a municipality or a municipal officer are very different from those which follow an attempt to exercise a power that does not exist in such municipality or officer. In the case at bar, the city actually constructed the building through Ward, whom it recognized as a contractor. We are unwilling to announce a rule of construction which would require every person furnishing a few dollars worth of material for a public work, or performing a few dollars worth of labor thereon, to ascertain at this peril whether the governing authorities had observed all the formalities of the law prior to entering into the contract. Such a construction would defeat the purpose of the law. As was said in *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. 621:

"By what authority or reasoning is one selling material to a municipal contractor made the curator of public interests, and required to do independently the work of the counsel for the city as to correctness of titles, or of the engineer as to the feasibility of the construction of a sewer or its utility when constructed? What considerations remove him from the protection of the presumption of performance of official duty by which persons dealing on the faith of instruments ordinarily have the right to rely?"



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The better view is that, where one, assuming to be a contractor, is engaged in the prosecution of a public work such as the authorities are authorized to carry on, and with their knowledge and consent, those who furnish labor and material for the work may rely upon the presumption that the public authorities have done their duty, and assume without investigation that he is a contractor. This principle is supported by the following authorities: *Green v. Okanogan County*, 60 Wash. 308, 111 Pac. 226; *Fransioli v. Thompson*, 55 Wash. 259, 104 Pac. 278; *Kansas City Hydraulic Press Brick Co. v. National Surety Co.*, 167 Fed. 496; *Bell v. Kirkland*, *supra*; *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 229 Pa. 1, 77 Atl. 1098; *People ex rel. Griffiths v. Board of Sup'rs of Oneida County*, 128 N. Y. Supp. 638.

In the *Green* case, a taxpayer sought to enjoin the execution of a contract let by the county for the construction of a bridge. Pending the action the bridge was completed and payment made. We held that the contract had not been legally entered into, but that the county was liable to the builder for the reasonable value of the bridge. While that case does not rest upon the statute under consideration in the case at bar, it discloses the equitable view adopted by this court where a municipality receives the benefit of a needed improvement which it had the power to make and seeks to retain the improvement and at the same time avoid liability for its creation. In the *Kansas City* case, a contractor's bond was given under a statute similar to our statute. The work was completed by the contractor under the supervision of the city, and then accepted and approved. The contractor failed to pay the plaintiff for material furnished for the work, and he brought suit upon the bond. The contract was held to be illegal, but a recovery upon the bond was permitted. It was there contended that the illegality of the contract extended to and vitiated the bond. In meeting this argument the court said:

"The plaintiff could have established its case without any aid from the illegal contracts. It is true that it pleaded those contracts in its complaint, and introduced them as part of its case upon the trial. This, however, was not necessary. The proof of the bonds, and the nonpayment of the purchase price of the brick used in constructing the improvements referred to in the bonds, would have made out a complete case in plaintiff's favor."

The manifest purpose of the statute is to give laborers and materialmen the same protection, in the absence of a bond, that they would have with the bond; in short, to substitute the credit of the municipality for the bond.

Authorities are cited, to the effect that one cannot sue upon a contract and recover upon a *quantum meruit*. It is true the complaint alleges the "agreed" price of the labor and material, but the evidence admitted without objection is that the goods were delivered to the contractor at their reasonable value. Without regard to the contract price, the respondent can recover only the reasonable value of the labor and goods. *Crowe & Co. v. Adkinson Const. Co.*, 67 Wash. 420, 121 Pac. 841.

It is argued that the statute, in so far as it gives a right of action against the municipality, is penal in its nature, and must be strictly construed, and that the word "contract" must be held to mean a contract executed in conformity with all the formalities of law. The statute is not penal but remedial in its nature. It does not differ in this respect from the statutes giving a lien upon the property of a private owner for goods furnished the contractor. In the one case, the property itself is holden as security for the debt; and in the other, in the absence of a bond, the state imposes a liability upon itself and its members for the reasonable value of labor and property for which it receives a benefit. The statute is simply a recognition of an equitable obligation.

The judgment is affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

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[No. 10364. Department Two. July 18, 1912.]

HOKO RIVER BOOM COMPANY, *Appellant*, v.  
ALSTON FAIRSERVICE *et al.*, *Respondents*.<sup>1</sup>

ADVERSE POSSESSION—COLOR OF TITLE—VOID DEED. A void deed is color of title starting the running of the statute of limitations.

LIMITATION OF ACTIONS—STATUTES—PROVISO—EFFECT ON PREEXISTING CAUSES—CONSTRUCTION—CANCELLATION OF TAX DEED. Where, prior to the passage of an act, the shortest period of limitation for the commencement of an action to set aside a tax deed and recover lands sold for taxes was seven years, and the act was passed limiting such actions to three years, "provided, this act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of the act," actions on all deeds issued prior to the passage of the act are barred unless commenced within one year after the passage of the act.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered February 15, 1912, dismissing an action to cancel a tax deed, upon sustaining an objection to the introduction of any evidence. Affirmed.

*Trumbull & Trumbull, Peters & Powell, and Marion Edwards*, for appellant.

*William B. Ritchie and Fletcher & Evans*, for respondents.

MORRIS, J.—This appeal involves the construction of the act of 1907, providing a limitation upon the commencement of actions to set aside or cancel deeds issued for lands sold for delinquent taxes. The judgment is based upon the sustaining of an objection to the introduction of evidence, made at the commencement of the trial; and while a number of interesting questions are discussed in the briefs as to the proper rules of law applicable to the facts alleged in the amended complaint, the whole case hinges upon whether the action is within the time provided for under the act of 1907. If it is

<sup>1</sup>Reported in 125 Pac. 145.

not, even though we should conclude, as contended by appellant, that the deed was void for any of the reasons suggested on this appeal, it would avail nothing; since we have a settled rule in this state that even a void deed is color of title, starting the running of the statute of limitations. *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462.

The act in question provides that all actions to set aside or cancel deeds issued for taxes, or actions brought for the recovery of lands sold for delinquent taxes, must be brought within three years from the date of the deed; "Provided, this act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act." The deed in this case was issued October 27, 1906. The statute became operative March 15, 1907, and this action was commenced October 26, 1909, within three years after the deed was issued, but more than one year after the statute became effective. Appellant contends that, inasmuch as it brought action within three years from the date of the deed, it is within time, as it was not intended by this act to cut off any right of action short of three years from the date it accrued. While respondent asserts that the deed, having been issued prior to the passage of the act, is subject to the one-year limitation named in the proviso. The latter seems to us to be the true and plain meaning of the law. It is evident that the law refers to two classes of deeds: (1) deeds issued subsequent to March 15, 1907; (2) deeds issued prior to that date. As to the first class, the limitation is three years from the day the deed is issued. The second class finds a limitation fixed at one year from the passage of the act. All deeds "not otherwise barred" must fall within one of these two classes, according to the date of issuance; and having found the class to which any deed belongs, the language fixing the limitation of action is plain.

Prior to the passage of this act the shortest limitation barring an action upon a tax deed was seven years. The

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legislature did not wish to take away the right of action then existing against such deeds as were still within this seven-year limitation; neither was it desired to continue the old statute for the purpose of saving a right of action against any deed not yet barred. All such deeds were grouped in the second class, and the right of action thereon limited to one year from the passage of the act. This would extend the old limitation period to some of these deeds and shorten it as to others. But it would at the same time make a uniform class as to the right of action. This was the evident purpose of the proviso, and the only way this uniformity could be obtained. There could be no objection to the extension of the right of action as to those deeds against which the old statute had all but run. Neither could there be any valid objection in law to shortening the time as to those deeds issued just prior to the passage of the new statute, and which had approximately seven years to run before reaching the bar of the statute. The legislature has the same right to shorten an existing limitation as it has to create a new one, so long as it provides for a reasonable time in which actions might be brought before the new bar becomes effective. It would hardly be contended that one year as fixed in this act was not a reasonable time. To hold that the three-year period first fixed by this act applies to all deeds issued within three years prior to the passage of the act as contended by appellant, is to read into the statute something not there, and overlook the plain intendment in the use of the word "heretofore" in the proviso. "Deeds heretofore issued" means all deeds heretofore issued, whether issued one day before or seven years before. "Actions not otherwise barred," would apply to any deed not fully seven years old March 15, 1907. But whether one day old or lacking one day of the full seven years, they were all classed together as "deeds heretofore issued" and against which actions were then "not otherwise barred." In *McKean v. Archer*, 52 Fed. 791, the court construed a statute of limitations reading as follows:

"The following actions shall be commenced within the period herein prescribed after the cause of action has accrued and not afterwards . . . Fifth. Upon promissory notes, bills of exchange, and other written contracts for the payment of money, hereafter executed, within ten years; provided, that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law limiting the commencement of actions, and not afterwards."

Held, the main part of the section applied to contracts executed after the enactment of the statute, and all contracts executed prior to that time should be governed by the terms of the proviso. The dividing line is no plainer in the Indiana statute there construed than it is in our statute. In each it is the day upon which the new law became effective. In *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850, the action was brought to vacate a tax judgment and set aside a tax deed executed September 17, 1904. The action was commenced December 26, 1908, four years and three months after the execution of the deed, and more than one year after the enactment of the 1907 statute of limitation, and it was held that the action could not be maintained; that even though the tax deed was void because based upon a void judgment, it constituted a sufficient basis for the running of the statute; and not having been commenced within one year after the statute became effective, the action could not be maintained.

In *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780, we were called upon to determine when this statute went into effect, and referring to different interpretations to which the limitation might be subjected, held that, in either event, as applied to that case, the limitation as to the right of action would be sufficient, since in the one case it would be nine months and in the other one year, and either would be a sufficient and reasonable time. Neither of these cases from this court is strictly authoritative here, as the real point at issue, which was determinative of the appeal, did not involve the point

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here submitted; although it is apparent that in the *Huber* case the court was of the opinion that an action upon a deed issued prior to the passage of this act must be brought within one year.

Believing that this action is barred, in that it was not brought within one year subsequent to the time when the act of 1907 became effective, we sustain the ruling of the court below, and the judgment is affirmed.

MOUNT, FULLERTON, and GOSE, JJ., concur.

ELLIS, J., took no part.

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[No. 9732. Department Two. July 19, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. F. B. COUNORT,  
*Appellant*.<sup>1</sup>

SCHOOLS AND SCHOOL DISTRICTS—OFFENSES—COMPULSORY ATTENDANCE—INFORMATION—SUFFICIENCY. An information for violation of the school law providing for compulsory attendance of children of school age in the public school of the district for the full term, or in a private school for the same term, is not defective in that it charges the neglect to cause the children to attend the public school or an "approved" private school, where the gist of the offense was in the failure to attend any school, public or private, and the information clearly charges such offense.

SAME—DEFENSES—HOME INSTRUCTION. It is no defense to a prosecution for violating the school law requiring parents to cause their children of school age to attend the public school of the district or a private school, that the parent is experienced and qualified as a teacher and gave private instruction to his own children at his home; such home instruction not being attendance at a private school within the meaning of the law, where he did not maintain a private school at his home as determined by the purpose, intent, and character of the endeavor.

APPEAL—REVIEW—HARMLESS ERROR. Error cannot be predicated upon sustaining an objection to two questions because united as one, one of which was improper, where appellant did not avail himself of an opportunity to sever the questions.

<sup>1</sup>Reported in 124 Pac. 910.

**APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS.** One general exception to "each and every" of the instructions is insufficient to secure a review of error in the instructions.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 27, 1911, upon a trial and conviction of violating the school law for compulsory attendance. Affirmed.

*Donald Downie* and *Moye Wicks*, for appellant.

*John L. Wiley*, *Geo. R. Lovejoy*, and *M. E. Jessep*, for respondent.

MORRIS, J.—Appellant was convicted of a violation of the school law in neglecting and refusing to cause his children, between the ages of eight and fifteen years, to attend the public school of the district in which he resides, or any approved private school, without obtaining an excuse for such failure and neglect to attend, from the county superintendent of schools. From such conviction he appeals.

The first error assigned is that the information does not charge a crime. The statute under which the information is drawn is Rem. & Bal. Code, § 4714:

"All parents, guardians and other persons in this state having or who may hereafter have immediate custody of any child between eight and fifteen years of age (being between the eighth and fifteenth birthdays), . . . shall cause such child to attend the public school of the district, in which the child resides, for the full time when such school may be in session or to attend a private school for the same time, unless the superintendent of the schools of the district in which the child resides, if there be such a superintendent, and in all other cases the county superintendents of common schools, shall have excused such child from such attendance because the child is physically or mentally unable to attend school or has already attained a reasonable proficiency in the branches required by law to be taught in the first eight grades of the public schools of this state as provided by the course of study of such school, or for some other sufficient reason. Proof of absence from public schools or approved private



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school shall be *prima facie* evidence of a violation of this section."

If we understand the objection made to the information, it is in the use of the word "approved," in charging the neglect or refusal to permit the children to attend an "approved private school." We can see no objection to the use of this word. The statute does not, in the first instance, provide that the private school shall be an approved one. The gist of the offense is in the failure to attend any school, either public or private, without having obtained an excuse for such failure from the superintendent of schools. The information clearly charges this refusal, and is sufficient.

The main assignments of error are in the admission and rejection of testimony, and as they all go to the same contention, they may be discussed together. The theory of appellant in this connection is that it would be a defense to this charge to show that he is experienced as a teacher and qualified to teach all branches required to be taught in the public schools of this state, and that he maintains a private school at his home for the instruction of his own children. We have no doubt many parents are capable of instructing their own children, but to permit such parents to withdraw their children from the public schools without permission from the superintendent of schools, and to instruct them at home, would be to disrupt our common school system and destroy its value to the state. This statute recognizes that adequate private schools may be maintained in any district to which parents may send their children without any violation of the law, and it would be a good defense to show attendance at such private school for the required time. We do not think that the giving of instruction by a parent to a child, conceding the competency of the parent to fully instruct the child in all that is taught in the public schools, is within the meaning of the law "to attend a private school." Such a requirement means more than home instruction; it means the same character of school as the public school, a regular, or-

ganized and existing institution making a business of instructing children of school age in the required studies and for the full time required by the laws of this state. The only difference between the two schools is the nature of the institution. One is a public institution, organized and maintained as one of the institutions of the state. The other is a private institution, organized and maintained by private individuals or corporations. There may be a difference in institution and government, but the purpose and end of both public and private schools must be the same—the education of children of school age. The parent who teaches his children at home, whatever be his reason for desiring to do so, does not maintain such a school. Undoubtedly a private school may be maintained in a private home in which the children of the instructor may be pupils. This provision of the law is not to be determined by the place where the school is maintained, nor the individuality or number of the pupils who attend it. It is to be determined by the purpose, intent and character of the endeavor. The evidence of the state was to the effect that appellant maintained no school at his home; that his two little girls could be seen playing about the house at all times during the ordinary school hours. No effort was made to refute this testimony. Appellant seemed to be impressed with the belief that, if he was a competent and qualified teacher and gave instruction to his children at his home, he maintained a private school within the meaning of the law. Such is not a compliance with the law.

We find no error in any ruling of the court upon questions propounded to witnesses for the state upon cross-examination. What has been said disposes of appellant's contention in this regard, except in one instance, where two questions were united in one, to which an objection was sustained. Counsel for appellant then asked leave to separate his questions, which was granted. He then asked a question clearly objectionable within what has heretofore been said, but made no attempt to include in any further question the

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matter which might have been proper in his first question if properly severed from the objectionable matter. Not having availed himself of the ruling of the court, appellant cannot now say error was committed.

Complaint is made of three of the instructions. The only exception we can find to the instructions is this: "The defendant excepts to each and every of the instructions." This exception is too general and, under the well settled rule, does not call for a review of the instructions.

The judgment is affirmed.

MOUNT, FULLERTON, CROW, and ELLIS, JJ., concur.

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[No. 10302. Department Two. July 19, 1912.]

KNICKERBOCKER COMPANY, *Appellant*, v. THE CITY OF  
SEATTLE, *Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS — STREETS—ASSESSMENTS—PERMANENT OR TEMPORARY STREET REPAIRS. The city charter and statute authorizing improvements to be made by planking, a plank roadway is a "permanent" improvement and not repair work, for which an assessment can be made, where it was intended for use until it wears out.

SAME. The power to levy special assessment for a street improvement is not exhausted by being once exercised.

SAME—DISCRETION OF COUNCIL—REVIEW. It is entirely within the discretion of the city to determine the necessity of an improvement, its character, and the materials out of which it shall be constructed.

Appeal from a judgment of the superior court for King county, Myers, J., entered December 19, 1911, confirming an assessment roll, upon appeal from the city council. Affirmed.

*Charles A. Riddle*, for appellant.

*James E. Bradford* and *J. Richard Dillon*, for respondent.

<sup>1</sup>Reported in 124 Pac. 922.

FULLERTON, J.—The appellant owns certain real property situated in the city of Seattle abutting upon a street known as Maynard avenue. Sometime in April, 1909, the city of Seattle caused Maynard avenue to be improved by erecting thereon a plank roadway. The top of the way was at grade, and rested in part on posts set on mudsills, and in part upon piles driven in the ground. The cost of this improvement was taxed against the property benefited, among which was the property of the appellant. Subsequent to the erection of the roadway, the city caused the street to be filled with earth. In making the fill, the mudsills, posts, and piles composing the structure were not removed, but the earth was filled over and around them, perhaps because they were necessary to support the roadway while the filling was being carried on. In 1911, some two years after the wooden structure was completed, the city found it necessary to relay the surface planking on the street. To that end they passed an ordinance providing for the work. In this ordinance it was provided that the new surface should be laid on the dirt fill, and that so much of the old structure as was suitable for that purpose should be used in the new work. The city engineer, who had charge of the improvement, testified that practically fifty per cent of the material required to make the new surface was taken from the old structure; that the stringers, caps, and certain other of the materials therein were practically as good as new, while the planking over which the traffic passed was the only part of the structure that was so far decayed and worn out as to be unfit for further use. The following also appears as part of his testimony:

“Q. Now, the original work of this roadway or bridge, as also the planking under the ordinance we are now discussing, were both intended as temporary work until the earth fill should settle and a permanent paving take place? A. We figure that the planking we are doing now in that district will last until it can be paved, until it can settle satisfactorily, so that it can be paved.”

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The city sought to assess the cost of making the improvement upon the property benefited thereby, and assessed a portion thereof to the above mentioned property of the appellant. The appellant protested against the assessment before the city council, and on the disallowance thereof by that body, appealed to the superior court of King county, where the order was affirmed. From the order of the superior court, the present appeal is taken.

It is the appellant's first contention that a city of the first class in this state has power to make only such improvements as are permanent in their nature by special assessment of property benefited, and that the improvement in question here which the city has sought to make at the expense of its property is mere repair work, temporary in its nature, and not such as may be called permanent. But we cannot concede that the improvement here in question is a mere temporary improvement. The life of planking when used as a roadway is, of course, short. It was said by the city's engineer that, upon streets having the traffic that usually passed over this one, its life was not to exceed two years. But both the city charter and statute permit improvements to be made of planking, and when it is expected, as it is in the case at bar, to allow it to remain in use until it wears out, it is a permanent improvement, as contradistinguished from an improvement to be used for the time being only. It is true, the appellant's property was assessed to bear the cost of an elevated roadway erected along this street but two years before the present improvement was authorized, but this fact in no way militates against the present assessment. The power to make local improvements at the expense of property benefited, like the general power to tax, is a continuing power and is not exhausted by being once exercised. 4 Dillon, *Municipal Corporations* (5th ed.), § 1447.

And since the power to determine the necessity for an improvement, the character of the same, and the materials out of which it shall be constructed, are wholly within the

discretion of the city when not expressly controlled by statute, the courts are without power to set aside or annul assessments merely because they may not be in accord with the city officers as to the wisdom of the course pursued with reference to the manner in which a street is improved. This view of the question discussed renders it unnecessary to notice other questions suggested in the briefs.

The judgment is affirmed.

ELLIS, MOUNT, and MORRIS, JJ., concur.

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[No. 10349. Department Two. July 19, 1912.]

THE STATE OF WASHINGTON, *on the Relation of John G. Olding et al., Respondent, v. SAMUEL STAMPFLY, Appellant.*<sup>1</sup>

WATERS AND WATER COURSES—APPROPRIATION—PUBLIC LANDS—SCHOOL LANDS—RESERVATIONS IN TERRITORY. School lands in a territory reserved by the Federal government for the use of the common schools of the future state are public lands of the United States, within the rule that the waters of streams on public lands are subject to appropriation under the acts of Cong. 14 Stat. at L. 253, and 16 Id. 218, granting the right as to all public lands generally.

JUDGMENT—CONCLUSIVENESS—PERSONS CONCLUDED. A judgment against the holder of a contract for the purchase of land from the state, determining his right to the waters of a stream, is conclusive upon one deriving his title through the grantee of the state, to whom the contract holder assigned the contract.

CONTEMPT—VIOLATION OF JUDGMENT—WATER RIGHTS. Where a deed conveyed one-half of the waters awarded to a party by a decree, the grantee is guilty of contempt in violating the decree if he uses more than half of the quantity fixed by the decree.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered October 31, 1911, adjudging a party guilty of contempt in violating a judgment, upon a hearing before the court. Affirmed.

<sup>1</sup>Reported in 125 Pac. 148.

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*Pruyn & Hoeffler*, for appellant.*Mires & Whitfield*, for respondent.

FULLERTON, J.—On December 1, 1891, one John Clifton entered into a contract with the state of Washington for the purchase of the southwest quarter of section 16, in township 18, north, of range 19, east of the Willamette Meridian, agreeing to pay therefor the sum of \$3,600, in ten annual installments of \$360 each, with interest on the deferred payments at the rate of six per centum per annum. The lands are riparian, so to speak, to a perennial stream, known as "Nanum Creek," which stream when left in its natural state flows over and across the lands in a well defined channel. Clifton settled on the lands prior to the time he contracted to purchase the same from the state, and from the time of his earliest settlement used water from the stream for the purposes of irrigating them. Other settlers on lands riparian to the stream, some of whom were prior and some of whom were subsequent in time to Clifton, also used water from the stream for irrigating purposes, which use gradually increased until all the water of the stream was so taken and used.

In August, 1897, differences arose between these users as to their respective rights, and an action was begun by one James Ferguson, as plaintiff, to determine such rights, in which all persons using water from the creek or thought to have rights therein were made parties defendant, among whom was John Clifton. Clifton answered the complaint in the action, setting up his possession of this particular quarter section and his right thereto in virtue of his contract with the state, averring that he had diverted water from Nanum creek and used the same in irrigating such land as early as 1885, and laid claim to a specific quantity thereof based on his appropriation and rights acquired thereunder. The action was subsequently tried out, and on May 6, 1901, a decree was entered therein in which the rights of all the

landowners to the use of water from the creek were adjudicated and determined; Clifton being awarded the right to divert and use for irrigating the quarter section described a fixed quantity thereof. Subsequent to the trial of the action, Clifton assigned his interests in the contract to one John Crocker, who procured a deed for the lands from the state to himself on October 10, 1902. Thereafter and on October 3, 1904, Crocker conveyed to Samuel Stampfly, the appellant in the present proceeding, the north half of such quarter section, "together with an undivided one-half of the waters awarded to the S. W.  $\frac{1}{4}$  of Sec. 16, Twp. 18, R. 19, E., by the decree entered in the case of James Ferguson v. The United States Bank et al.," being the decree hereinbefore referred to.

Subsequent to his purchase of the property, Stampfly used water from Nanum creek in excess of one-half of that awarded Clifton in the decree mentioned, conveyed to him by the deed from Crocker. Proceedings in contempt were instituted against him, charging him with violating the provisions of the decree; and on a hearing had thereon, he was adjudged guilty of contempt, and sentenced to pay a fine. From the judgment and sentence, this appeal is prosecuted.

The appellant contends that the water rights appurtenant to the land purchased by him from Crocker were not legally determined by the decree in the case of Ferguson v. United States National Bank et al. Attention is called to the fact that this court has held in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107, and *Nesalhou v. Walker*, 45 Wash. 621, 88 Pac. 1032, that the common law doctrine of riparian rights prevails in this state with reference to streams flowing across lands not public lands of the United States, and that such streams cannot be diverted from their natural courses by mere prior appropriation to the detriment of owners of such lands; and it is argued that school lands, reserved by the government of the United States for the use of the common schools of the state that



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may be organized out of the territory in which the reserved lands lie, are not public lands of the United States; and hence, any stream to which they may be riparian is not subject to appropriation, but on the contrary such streams are appurtenant to the land and pass to the state with the cession of the land to the state, and from the state to its grantees, who may lawfully make such use of the streams as the rules governing riparian ownership will permit, without regard to the claims of prior appropriators; contending further that, since the land in question was school land, ceded to the state of Washington on its admission into the Union without reservation of any kind, the state took title to the land with all of its appurtenances, which title the appellant has since acquired; and since the state was not estopped from claiming the water either because of prior appropriation of the same or by the terms of the decree—not by the prior appropriation because the water was not capable of being taken by prior appropriation since the lands were not at the time public lands of the United States, and not by the decree because the state was not a party thereto—it could convey these rights to the appellant.

But plausible as these contentions may appear, we do not think them conclusive, for a number of reasons. In the first place, we cannot agree with the contention that streams of water riparian to government lands reserved as school lands could not be diverted by appropriation. It is true that the government has, from the earliest times, sought to reserve in its territories certain sections in every township of land for the benefit of the common schools of the states that may be formed out of such territories; but, in so far as we are aware, these reservations have never been thought to be irrevocable or as conferring on the future states any rights in the land antedating their actual cession to the state, but on the contrary have always been thought to be subject to such laws and changes in the laws regulating the primary disposition of the soil as the Congress chose to enact. It is a

matter of history that it has been the custom of the people from the earliest times to go upon a stream or other source of water supply on the public domain and divert therefrom and appropriate to private uses such water as the necessities of the appropriators required, and that by another custom the rights of conflicting claimants in the same source of supply were determined by priority of diversion and use. Although the practice may not have had in its inception the recognition of the government, it early met therewith. By the act of Congress of July 26, 1866 (14 Stat. at Large, 253), it was provided that:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.”

And by the act of July 9, 1870, 16 Stat. at Large, p. 218, it was further provided:

“All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.”

These statutes, it will be observed, are general in their application and apply to all government lands. No exception is made in favor of lands reserved for the benefit of the common schools of future states, and it is clear that none was intended; but on the contrary it was intended that rights in waters riparian to such reserved lands could be acquired by appropriation in the same manner that such rights were

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acquired in waters riparian to the public lands generally. It follows therefrom that the appellant in the case at bar has no superior right to the water in question, in virtue of the fact that his land was school land held in reserve by the United States for the benefit of the future state of Washington at the time the waters of Nanum Creek were first appropriated for the purposes of irrigation.

The conclusion we have reached on the question stated, although it denies the appellant's right to use the waters of the creek named for irrigation purposes as against prior appropriators, does not necessarily subject him to the punishment the court inflicted upon him. While he can be prevented in a proper proceeding from making use of the water as against those who have superior rights, he cannot be adjudged in contempt for so doing unless he is in privity with and bound by the decree in the Ferguson case. As to this question, it is our opinion that he is so bound. Notwithstanding the fact that he derives his legal title through John Crocker, who was the immediate grantee of the state, it is plain that the equitable title and beneficial interest in the property came to Crocker from John Clifton, the holder of the contract for the purchase of the land from the state. And since Clifton was a party to the decree and bound thereby, his assignee was likewise bound; and being so bound, the assignee could not convey any greater interest to the appellant than he himself held. That no attempt was made to convey any greater interest than that fixed by the decree is evidenced by the deed itself. By the express terms of the deed, the quantity of water conveyed is limited to one-half the quantity of water that was awarded to John Clifton by the decree mentioned. We conclude that the appellant is bound by the decree, and was justly punished for violating it. The judgment is affirmed.

ELLIS, MOUNT, MORRIS, and GOSE, JJ., concur.

[No. 9669. Department Two. July 19, 1912.]

M. C. GRAY *et al.*, *Respondents*, v. C. H. REEVES *et al.*,  
*Appellants*.<sup>1</sup>

**FRAUD—FALSE REPRESENTATIONS—LIABILITY—INDUCEMENTS.** There is actionable fraud for which recovery may be had, where the defendant induced the plaintiff to purchase mining stock relying on the element of friendship, the defendant's experience as a mining man, the promise of a certain fortune, and the false representations that the stock was nonassessable and that the money paid would be used for the development of the property.

**CORPORATIONS—SALE OF STOCK—RESCISSION—FRAUD.** The purchaser of mining stock is entitled to rescind where it was represented that the same was treasury stock and that the money paid was to be used in development, when in fact it was the personal stock of the seller.

**EQUITY—LACHES—STATUTE OF LIMITATIONS—MINING STOCK AND PROPERTY.** Laches will not prevent the recovery for fraud in the sale of mining stock, where there is no element of estoppel or any special circumstance rendering inequitable the prosecution of an action within the time fixed by the statute of limitations; mining stock not being within the rule that the doctrine of laches is peculiarly applicable to mining property, when the corporation and its property were not involved.

**DAMAGES—INTEREST—FRAUD.** Interest is recoverable as a measure of damages where money is wrongfully obtained by fraudulent representations on the sale of stock which was of no value to the purchaser.

Appeal from a judgment of the superior court for Spokane county, Carey, J., entered March 3, 1911, in favor of the plaintiffs, in an action for equitable relief, after a trial on the merits before the court. Affirmed.

*Myron A. Folsom* (*John H. Wourms*, of counsel), for appellants.

*Harry A. Rhodes* and *Moye Wicks*, for respondents.

<sup>1</sup>Reported in 125 Pac. 162.

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CHADWICK, J.—On June 6, 1907, appellant C. H. Reeves sold to respondent M. C. Gray certain mining stock. Reeves for many years had been a practical mining man. He was a part owner in the Hercules mine, one of the famous silver-lead producers in the Coeur d'Alene mining district. His acquaintance with Mr. Gray dates from some time in the year 1904, when Mr. Gray sold him a horse. He was the president and a stockholder in the Sunrise Mining Company, a corporation organized under the laws of Idaho, and owning ground in the immediate vicinity of the Hercules mine. Mr. Gray was, at the time of the sale and for some time prior thereto, engaged in the business of breeding and importing fine horses. His place of business and residence was at Pullman, Washington. He had accumulated a comfortable fortune. Reeves and Gray became acquainted in 1904, as before stated, and they had become fast friends, Mr. Reeves on one occasion making Mr. Gray a present of a valuable cane as a token of his esteem.

Mr. Gray testifies—and in the main he is supported by other witnesses—that on or about June 8, 1907, Mr. Reeves went to Pullman with samples of ore which he claimed came out of the Sunrise mine; that he represented that the property had passed beyond the experimental stage; that it was in good milling ore, and was expected to make a mine of the character and value of the Hercules; that he told him of the fortunes he had made for the Days and Mr. Paulsen and Mr. Hutton by inducing them to come into the Hercules, and that because of his friendship for Mr. Gray he intended to give him the same chance; that he was the president of the company, and that the money Gray put in would be used for development purposes; that Gray and wife, who was present and participated in the transaction, relying solely upon their faith in Mr. Reeves and having no knowledge of mines or mining, were induced to purchase 50,000 shares of the stock at twenty-five cents per share, for which they paid

\$10,000 in cash and gave a note for \$2,500, which was paid one year after date.

The testimony offered on behalf of the respondents tends to establish the following facts: (1) That Mr. Reeves represented that the mine was sufficiently developed and had ore in quantities sufficient to insure its permanence and value; (2) that the stock was nonassessable; (3) that Reeves was selling treasury stock the proceeds of which would go for the development of the property; (4) that Reeves was getting no benefit in the way of personal profit out of the transaction; and (5) that, if respondents should become dissatisfied at any time, he would take the stock off their hands. The testimony of both sides shows that the mine is no more than a prospect, having no ore in commercial quantities in sight—"a good prospect but not a mine;" that the stock was assessable and, in fact, assessed; that Reeves sold his own stock and at a considerable profit, and that no part of the purchase price went to the company; while upon the fifth issue the testimony of the appellant and one of his witnesses is to the effect that, while he did not promise to take the stock back, he did say that, if the Sunrise did not turn out to be a mine, he would give Mr. Gray an equal number of shares in other property.

The record is long and much detail might be recited, but it would be useless to do so; for we are satisfied that the testimony clearly preponderates in favor of the respondents. A point is made that Mr. Gray was a shrewd and successful business man and ought not to have been misled by promises that, when revealed in the courtroom, seem to be unreasonable. But in this appellants have overlooked an element which disarms caution; that is, friendship. It is the duty of a chancellor to put himself in the position of the parties and test their rights and obligations by the standards of conscience. The impulse that leads men to trust those in whom they have confidence cannot be ignored by the courts. Reputation for integrity or for knowledge of a given subject

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would be worth nothing if its possessor could not assume that others would believe in him or accept his opinion. Hence, when men deal as friends and the one accepts that as true which but for the element of friendship would put a man upon inquiry, the law will protect him in his trust as certainly as it will deny him relief if the personal relations of the parties are such that the dealing is at arm's length. Although everything that would tend to show fraud in law is denied or qualified by explanation, we have here two men, the one an experienced mining man whose connection with a mine of sensational history had made him the envy of all who had not touched hands with luck; the other, shrewd and successful in the unemotional pursuit of trade, but utterly ignorant of mines and mining. The one makes his own career, rich samples of ore, a promise of certain fortune, and the assurance that the money paid was for the benefit of the property—or, in other words, to enhance the value of the actual money invested, inducements to the trade. To say that a man who is moved to part with his money under such circumstances is to be held at arm's length, is to deny sustenance to the very root of society; to make friendship a liability instead of an asset. The decree of the lower court is sustained by many decisions of this court. Most of them have been collected and may be referred to in *Blum v. Smith*, 66 Wash. 192, 119 Pac. 183. See, also, *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Landis v. Wintermute*, 41 Wash. 673, 82 Pac. 100; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *Jones v. Hawk*, 64 Wash. 171, 116 Pac. 642; *Kohl v. Taylor*, 62 Wash. 678, 114 Pac. 874, 35 L. R. A. (N. S.) 174.

Moreover, it may be well questioned whether the minds of the parties ever met in the first place. Taking the case of appellants at its full worth, it may be that Mr. Gray was willing to make an investment in the property itself, to pay his money toward the development of the mine, or to make a business venture. In such cases, the law would hold him to his bargain. In this case it seems clear that Mr. Gray

had no intention of buying the personal stock of Mr. Reeves. He was not seeking a speculation, but an investment. We have no doubt that Mr. Reeves knew this to be so, and when he sold him his personal stock instead of the treasury stock of the company, he cannot complain if his adversary in the trade insists upon a rescission.

But it is said that respondents cannot recover under the doctrine of laches. The following cases are cited: *Upton v. Tribilcock*, 91 U. S. 45; *Cunningham v. Independence Consol. Min. Co.*, 58 Wash. 371, 108 Pac. 956; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Southern Development Co. v. Silva*, 125 U. S. 247. These cases adopt the theory that the doctrine of laches is peculiarly applicable where mining property is involved. The doctrine has been applied in such cases because the character of the property or the manner of its transfer, and all the incidents attending its use and ownership, are circumstances to be considered. But this is not a mining case. The subject-matter of the trade between the parties was indeed mining stock, but their rights and obligations in no way affect the mining corporation or its property. Where we have, as in this state, a general statute of limitations, the doctrine of laches is not applied *sua sponte*. Laches is akin to and governed by the same rules as estoppel. *Conaway v. Co-operative Homebuilders*, 65 Wash. 89, 117 Pac. 716.

Appellants also rely on *Romaine v. Excelsior Carbide & Gas Machine Co.*, 54 Wash. 41, 103 Pac. 32. That case is not in point. The action was there brought against the company, and it appeared that the rights of third parties had intervened. We have said that "unless there be some controlling equity, the court will not conjure the doctrine of laches to defeat or destroy a statute fixing a time within which actions may be brought." *Roger v. Whitham*, 56 Wash. 190, 105 Pac. 628, 134 Am. St. 1105. Nor will the doctrine avail where nothing is shown but the lapse of time. There must be some special circumstances disclosed in the



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instant case which would render the prosecution of the suit inequitable. *Cordiner v. Finch Inv. Co.*, 54 Wash. 574, 103 Pac. 829. It is not made to appear in this case that the rights of third parties have intervened or that the delay has misled appellants in any way.

It is complained that the court erred in allowing interest. *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 100, is cited, among other cases, as authority. Just why interest was not allowed in that case is not made clear. The allowance of interest, like the recovery itself, depends upon the equities of the case. If the character of the property be such that its use or occupation is of value while in the vendee's possession, interest will not ordinarily be allowed upon rescission; but where the recovery is allowed upon the ground of fraud or deceit, and the property sold is of no value to the vendee, if the consideration be money, interest will be allowed almost as a matter of course. Where money is wrongfully obtained, it is proper to allow interest as a measure of damages. 16 Am. & Eng. Ency. Law (2d ed.), 1012; *Doggett v. Emerson*, Fed. Case, No. 3,962; *Corse v. Minnesota Grain Co.*, 94 Minn. 331, 102 N. W. 728; *Perkins v. Rice*, Littell's Select Cases (Ky.) 218, 12 Am. Dec. 299. See, also, *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381.

Being convinced, as the trial court was, that the equities of this case lie with the respondents, we affirm the judgment of the lower court.

ELLIS, CROW, and MORRIS, JJ., concur.

[No. 10018. Department One. July 20, 1912.]

GREAT NORTHERN RAILWAY COMPANY, *Appellant*, v.  
JAMES A. HOWER *et al.*, *Respondents*.<sup>1</sup>

PUBLIC LANDS—DECISIONS OF DEPARTMENT—CONCLUSIVENESS—HOMESTEAD ENTRY—UNSURVEYED LANDS—MISTAKE. Under the rule that decisions of the land department upon questions of fact are conclusive, and that courts of equity will relieve only against fraud or mistake or erroneous conclusions of law, the decision of the land department that a settler on unsurveyed public lands was acting in good faith and constructively in possession of the tract upon which he supposed his dwelling to be located is conclusive and controlling, where there is no contention of fraud or mistake, his notice was posted on the tract, he acted in good faith, and the contesting railroad company sustained no actual loss other than it would have sustained had the land upon which the improvements were actually located been awarded to the settler.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered July 5, 1911, dismissing an action to quiet title, upon sustaining a demurrer to the complaint. Affirmed.

*F. V. Brown* and *F. G. Dorety*, for appellant.

*J. A. Coleman*, for respondents.

CROW, J.—Action by Great Northern Railway Company, a corporation, against James A. Hower and others, to quiet title to land. Defendants' demurrer was sustained to the amended complaint. Thereupon plaintiff declined to plead further, and appealed from an order of dismissal.

The amended complaint is too voluminous to be here set forth. The appellant railway company, as successor of St. Paul, Minneapolis & Manitoba Railway Company, a corporation, claims the land under act of Congress of August 5, 1892, 27 Stats. at Large, p. 390, chap. 382. The amended complaint alleges that on October 20, 1892, the St. Paul, Minneapolis & Manitoba Railway Company released certain

<sup>1</sup>Reported in 125 Pac. 159.

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lands in North Dakota; that on March 24, 1894, it selected in lieu thereof under said act of Congress a certain tract of unsurveyed land in King county, Washington, which when surveyed was found to be the northeast quarter of section 2, township 27, north, of range 10, east of the Willamette Meridian; that it filed in the United States land office at Seattle a list describing the land with reasonable certainty; that the land so selected was not reserved; that no adverse claim had attached or been initiated thereto; that it was thereafter surveyed, the plat of survey being filed in the United States land office at Seattle on April 11, 1899; that, when the plat was filed, the selected land was found to be the northeast quarter of section 2, township 27, north of range 10 east, W. M.; and that on April 11, 1899, appellant's grantor filed a supplemental selection which redescribed the land so as to make the same conform to the lines and subdivisions of the government survey. The amended complaint further states that, on or about April 18, 1899, one Melvin J. Carter, respondents' grantor, filed in the United States land office, at Seattle, his written application to enter the same quarter section under the homestead laws, claiming he had settled on the land on December 1, 1893; that after various hearings and appeals, the land was awarded and patented to Carter by the decision of the secretary of the interior; that the land officers committed error of law in awarding the land to Carter, as he had made no actual settlement in compliance with the homestead laws. Prior to the hearing of the demurrer, the following written stipulation was filed:

"In passing upon the demurrer to the amended complaint, it is stipulated that the court may consider the decisions of the land department, referred to in the amended complaint, namely:

"The decision of the register and receiver of August 28, 1903.

"The decision of the acting assistant commissioner of March 23, 1904.

"The decision of the register and receiver of January 21, 1905.

"The decision of the acting commissioner of June 30, 1905.

"The decision of the secretary of the interior of November 23, 1905, and that the annexed are true copies of said decisions."

Copies of these decisions are attached to the stipulation. From the allegations of the amended complaint and these decisions, it appears that the following facts relative to Carter's settlement, improvements, and claim were found by the land department officials: that Carter's house was located on lot 2, a portion of the northwest quarter of the section; that, prior to 1893, one Doolin made settlement on what is now known as lot 2; that a short distance below him one Moe also made a settlement; that Melvin J. Carter and his father, E. B. Carter, went upon the land on September 19, 1893, Melvin J. Carter buying Doolin's cabin and E. B. Carter buying Moe's cabin; that each built a new cabin; that Melvin J. Carter claimed what he supposed was the northeast quarter of the section; that about a year later, with the assistance of his father, he constructed a trail across the section and up Trout creek on the northeast quarter, for the purpose of reaching different places on the claim; that he built a barn and stable which he used for storing supplies; that he posted on the north section line a homestead notice; that the trail, barn, and notice, since the survey, are shown to have been on the northeast quarter, but that his house and most of the cultivated ground are on lot 2 in the northwest quarter, the house being about one quarter of a mile west of the quarter section line; that lot 2 on which both Carters were living has been patented to the father E. B. Carter without protest from Melvin J. Carter; that lot 1 lies between lot 2 and the northeast quarter, east of the former and west of the latter; that the railway company had selected the entire section; that Melvin J. Carter made no protest against the company's claim to the north-

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west quarter, but allowed it to obtain a patent for lot 1 thereof; that neither Melvin J. Carter nor his father thought they were interfering one with the other; that Melvin J. Carter was claiming to the east from his home, while his father was claiming towards the south; that Melvin had acted in good faith; that he offered to amend his application so as to include the land upon which the government should finally determine his improvements were actually located, and drop from either the eastern or southerly boundary of his claim sufficient land to enable him to include the tracts upon which his improvements were made; that this could not be done as a patent had been issued to the railway company for lot 1; that the northeast quarter should be patented to Melvin J. Carter; and that the railway company, having selected the entire section, would lose no more land than it would have lost had Carter applied for lot 1 with a sufficient portion of the northeast quarter to make one hundred and sixty acres. In the opinion of the secretary of the interior, addressed to the commissioner of the general land office, he said:

“As Carter tendered his homestead application directly after the filing of the plat, presumably he still believed that his house was located on the northeast quarter. As he is shown to have been a *bona fide* homestead settler upon unsurveyed land at the time the railway company made selection thereof, and subsequently has made a good compliance with the law as to residence and improvements, the department is of opinion that his application for the tract in question should be allowed. As the railway company made selection of the entire section, it loses no more land than it would if Carter had applied for said lot 1 with sufficient in the northeast quarter to make 160 acres. Your office decision holding in favor of Carter is affirmed and upon his perfecting his application for said northeast quarter of Sec. 2, T. 27 N., R. 10 E., the railway company's selection thereof will be cancelled.”

The theory upon which the patent was awarded to Melvin J. Carter was that he had acted in good faith; that his settle-

ment was prior in date to the selection made by the railway company; that the land was then unsurveyed, and that constructively his improvements and settlement were made on the northeast quarter.

Appellant concedes that the facts found by officers of the land department bearing upon the good faith of Melvin J. Carter cannot be reviewed in this action, but insists that their conclusions of law, if erroneous, may and should be here corrected. The doctrine is well established that the decisions of officials of the land department upon questions of fact, although reviewable upon appeals within the department itself, are conclusive on all courts of justice, in the absence of fraud or mistake; but that courts of equity have jurisdiction to correct mistakes, to relieve against fraud, or to afford a remedy when it becomes apparent that the officials of the land department have, by erroneous conclusions of law, given to one claimant public land which upon the undisputed facts should have been patented to another. *Shepley v. Cowan*, 91 U. S. 330; *Moors v. Robbins*, 96 U. S. 530; *Quinby v. Conlan*, 104 U. S. 420; *Baldwin v. Stark*, 107 U. S. 463; *Gonzales v. French*, 164 U. S. 338; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Grays Harbor Co. v. Drumm*, 23 Wash. 706, 63 Pac. 530.

There is no contention that fraud or mistake has been pleaded in this action. The officers of the land department found that Melvin J. Carter was residing on the land before the railway company made its selection; that, although his dwelling house was on an adjoining tract his notice was posted on the northeast quarter; that a portion of his improvements were thereon; that he acted in good faith; and that the railway company has sustained no actual loss other than it would sustain had the land upon which his improvements were actually located been awarded him. These findings are not and cannot be questioned. The United States land department has repeatedly held that a settler constructively residing upon lands claimed by him should be

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permitted to acquire the title. *Talkington's Heirs v. Hempfling*, 2 Land Dec. 46; *Lewis C. Huling*, 10 Land Dec. 83; *Kendrick v. Doyle*, 12 Land Dec. 67; *Staples v. Richardson*, 16 Land Dec. 248.

Appellant, citing numerous land office decisions, concedes that the residence of a homestead and preemption claimant, not upon his claim, has been frequently held a sufficient compliance with the law; but insists that such decisions are not controlling here, as in each of them the residence involved was only a short distance beyond the line, was moved upon the land as soon as the mistake was discovered, and that in nearly all if not all such cases, there were other substantial improvements on the land claimed. Appellant calls attention to the fact that in this case Carter's dwelling house was a quarter of a mile distant from the land claimed, and argues that no case heretofore decided has held such a remote residence to have been a sufficient compliance with the requirements of the homestead act. In most of the cases which appellant has cited the land had been surveyed before the settlement or improvements were made. Not only was this land unsurveyed, but the facts found and pleaded show that in places it was rough, uneven and difficult of access. In *Keogle v. Griffith*, 13 Land Dec. 7, one of the cases cited by appellant, it affirmatively appeared that the claimant's improvements were about forty rods from the land entered, yet a patent was awarded. Upon the facts before us, we conclude the decisions of the land department were controlling. "The law deals tenderly with one who in good faith goes upon the public lands with a view of making a home thereon." *Ard v. Brandon*, 156 U. S. 537, 543. The land was rightfully awarded and patented to respondents' assignor, Melvin J. Carter. The amended complaint does not state a cause of action. The judgment is affirmed.

PARKER, CHADWICK, and GOSE, JJ., concur.

[No. 9736. Department One. July 23, 1912.]

ALBERT E. PARKER *et al.*, Respondents, v. ANSON S.  
BURWELL *et al.*, Appellants.<sup>1</sup>

TRUSTS—CONSTRUCTIVE TRUST—SALE OF LAND—EVIDENCE—SUFFICIENCY. A constructive trust in lands in favor of the plaintiff is established where it appears that plaintiff purchased state lands at public sale and fully performed the contract, but defendants procured the state deed by representing to the commissioner of public lands that a default judgment awarding defendants the right to the property and operating as an assignment of the state contract had become final, when in fact a petition for the vacation of the judgment was pending, and it was finally vacated and the action dismissed, and there was no consideration for a direction by the plaintiff to allow defendants to purchase the land which constituted the basis for the action.

VENDOR AND PURCHASER—BONA FIDE PURCHASERS—NOTICE—LIS PENDENS. The recording of an original contract for the sale of state lands, and the filing of a *lis pendens* in an action against the purchaser for the recovery of the land, by one claiming the right to purchase from the state, imparts notice of the rights of the original purchaser as against grantees of the plaintiff in the suit.

Appeal from a judgment of the superior court for King county, Joiner, J., entered January 14, 1911, upon findings in favor of the plaintiffs, in an action to declare a trust. Affirmed.

*Ira Bronson*, for appellants.

*Robert H. Evans*, for respondents.

GOSE, J.—This is a bill in equity, seeking to have it decreed that the defendants are holding certain real estate as trustees for the plaintiffs. There was a judgment for the plaintiffs. The defendants have appealed.

The land in controversy is second-class tide land, situated in Kitsap county. The case was commenced in the superior court of Kitsap county, and was by stipulation removed to

<sup>1</sup>Reported in 125 Pac. 151.



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King county, where it was tried. The property was sold to the respondent Albert E. Parker, hereafter called the purchaser, for its appraised value, on January 18, 1904, at a public sale regularly conducted by the county auditor of Kitsap county. The sale was made on the application of the appellant Anson S. Burwell. It was advertised to take place at two o'clock p. m.; but in compliance with a request by telephone from a representative of the appellants, it was postponed until three o'clock, when the sale took place as stated. At the time of the sale, the purchaser paid one-tenth of the purchase price and received the auditor's receipt therefor. A representative of the appellants intended to attend the sale and bid on the property in their behalf, but did not reach the place of sale until after the property had been sold. He then had a conversation with the purchaser, and received from him the following note:

"Jan. 18, 1904.

"Mr. Jameson,—You can allow the contract to the tide land purchased by me last to go to Mr. Anson B. Burwell. Albert C. Parker."

He presented this note to the county auditor and gave him a check for \$75. The auditor, relying upon the note and statements made to him by the appellants' representative, reported the sale to the state land commissioner as having been made to the appellant Burwell, and returned the purchaser's check. The purchaser promptly returned the check, and demanded that the contract of sale should be issued to him. Thereafter the auditor had his report of sale returned, and reported Parker as the purchaser. The contract was thereafter, on February 9, 1904, regularly executed between the state and the purchaser. It was regularly filed for record, and recorded on February 15 following.

The appellant Anson S. Burwell then commenced an action in the superior court of Kitsap county against the purchaser and the state land commissioner, alleging fraud upon the part of the purchaser, and a default judgment was entered

in his behalf on September 24, 1904, setting aside the sale and directing that a contract be issued to him. On December 18, the purchaser filed a motion to vacate the judgment. No action was taken on the motion until late in 1909, when it was argued and submitted. On January 19, 1910, the motion was sustained and the judgment vacated. The plaintiff in that suit thereupon caused it to be dismissed. On July 25, 1904, the appellant Burwell, in connection with his suit, regularly filed a *lis pendens* in Kitsap county.

The purchaser made the payments as provided in the contract up to September 19, 1907, when he tendered the balance due and demanded a deed. He also paid the taxes for the years 1904, 1905, and 1906, and tendered the taxes for 1907. The tender was refused because the appellant Burwell had theretofore paid the taxes for that year. The tender of the purchaser and his demand for a deed were refused in consequence of the judgment to which we have adverted, which had been called to the attention of the land commissioner. On October 14, 1908, while the Parker contract was in full force, a deed was executed to the appellant Burwell, upon the representations of the appellants or their representatives that the judgment had become final, and that it operated as an involuntary assignment of the contract. The respondents, before the commencement of this action, tendered to the appellant Burwell the amount paid by him in procuring the deed; and upon his refusal to accept the tender, deposited the money in the registry of the court. The Burwells, after receiving the deed, conveyed a part of the property to their coappellants by deeds of quitclaim.

The appellants contend that the note which we have set forth operated as an executed gift from the purchaser to the appellant Burwell. The vice of this contention is that it has no support in the evidence. Parker testified that he gave the note so that the contract of sale might be issued to the appellant Burwell, in order that he might acquire the property in front of his uplands and convey the remainder to

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Parker; and a reading of the record convinces us that that was his sole purpose in giving the note. A few days later, he demanded that the contract be executed in his favor, and on February 9, 1904, he conveyed the property in front of the appellant Burwell's uplands to the latter by a deed of quitclaim, and refused to convey to him the property in controversy. The deed was accepted by Burwell, and the property embraced in that deed is not in litigation. It is not contended that any fiduciary relation existed between the purchaser and Burwell. Indeed, the latter testified that Parker did not represent him at the sale. It is apparent from the record that Parker never intended that the appellants should have the land in controversy. He bought it for himself at a public sale regularly conducted by the state, and received a regularly executed contract. This contract, as we have seen, was performed by him in every respect.

The appellants rely upon the Parker note and the default judgment. There was no consideration for the note, and the judgment has been vacated and that suit dismissed. We think the whole controversy arose out of a misunderstanding between Parker and the appellants' representative, in a conversation which took place between them shortly after the sale and at the time Parker wrote the note. This is made clear by affidavits made by the county auditor and a party who attended the sale shortly after this controversy arose. It is clear from the testimony of the land commissioner that the deed was executed to Burwell under a mistake of fact. The commissioner was led to believe that the judgment vacating the sale had become final. This is made clear, both by his testimony and the notations in the records of his office.

The appellants other than the Burwells are not innocent purchasers. They hold through quitclaim deeds. Moreover, as we have seen, the original contract was regularly filed for record and a *lis pendens* was filed in the suit of Burwell v. Parker and others. These instruments imparted notice of Parker's rights to intending purchasers. The paramount

equities are clearly with the respondents, and the judgment is affirmed.

FULLERTON, PARKER, and MOUNT, JJ., concur.

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[No. 10421. Department One. July 25, 1912.]

INTERNATIONAL CONTRACT COMPANY, *Appellant*, v. THE  
CITY OF SEATTLE, *Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—CLAIMS—FILING—BREACH OF CONTRACT. Seattle Charter, art. 4, § 29, providing that all claims for damages against the city must be presented to the city council and filed with the city clerk within thirty days after the time when such claim for damages accrues, all such claims to accurately locate and describe the defect that caused the injury, applies to actions for damages arising *ex contractu* as well as *ex delicto*, and bars an action for damages by a contractor for expense incurred and loss of profits through breach of contract, where no claim therefor was filed within the time limit.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 3, 1912, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Preston & Thorgrimson*, for appellant.

*James E. Bradford* and *Howard M. Findley*, for respondent.

CHADWICK, J.—A contract was let to the appellant to do certain street work in the city of Seattle. The work was to be done under the special assessment plan, and was to be paid for in the main out of the special fund so to be raised. Appellant went to some expense in preparing for the work, and pursuant to its contract, entered upon its execution. The work was materially interrupted, and finally stopped by the city on account of objections by interested property

<sup>1</sup>Reported in 125 Pac. 152.

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owners. A suit was brought by appellant, claiming damages for expense incurred and loss of profits. The trial court found that appellant had been actually damaged in the sum of \$1,294.08, but held that, under the charter provision relating to claims against the city, it could not recover. The provision is as follows:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation." Seattle Charter, art. 4, § 29.

It is contended by appellant that its claim arises *ex contractu*, and under the authority of *Sheafe v. Seattle*, 18 Wash. 298, 51 Pac. 385, its right of action does not depend upon filing a claim within the time limited or at all; that the cases of *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107, and *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025, which are relied on by respondent and which it is evident the trial judge followed, apply only to cases arising *ex delicto*. An extended discussion of the question whether the claim is one *ex contractu* or *ex delicto* is made in the briefs. This we shall not follow for, notwithstanding the belief of the writer of this opinion that the charter was not intended to cover claims for damages arising from a breach of contract to which the city was a party, the law seems to be settled to the contrary. Construing the same charter provision, this

court pronounced the decisions in *Postel v. Seattle* and *Jurey v. Seattle*. We have no doubt of the intention of the court to hold in the *Postel* case that all claims for damages whether sounding in tort or contract, must be presented within the time and in the manner there provided. It is there said:

“The trial court held that this section of the city’s charter requires claims for damages of all kinds against the city to be presented to the city council and filed with the city clerk within thirty days after the time when such claim accrues, before an action can be commenced thereon; and since the appellant did not file his claim until some five months after its accrual, it was barred by this provision of the charter. Against this ruling, the appellant makes two contentions: first, that this provision does not apply to this character of claim; and second, if it does so apply, it is void because a reasonable time within which to present such claims is not allowed by it. With regard to the first question, we think there can be but little doubt that the charter provision requires claims of this character to be presented to the city council and filed with the clerk. The language used is ‘all claims for damages,’ and this admits of no exception.”

The attention of the court to the extremity of its holding was challenged by Judge Rudkin, who took occasion to dissent upon the very ground that, under this decision, claims of whatever character must be filed in manner and form as provided in the charter. A like ruling was made in the *Jurey* case, where it was held that a breach of duty, the wrongful diversion of a special fund, and wilful failure to collect the same, sounded in tort, and that a claim must be filed within thirty days. In the *Postel* as well as the *Jurey* case, the city violated a positive duty to protect the property of the citizen and to collect and distribute to him that which was his lawful due under a positive contract. We see no difference in principle between these cases and the one at bar. Here the city stopped the work after appellant had gone to the expense of equipping itself to carry out its

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contract, and has as effectually destroyed the fund as was done in the *Jurey* case.

The case of *Giuricevic v. Tacoma*, 57 Wash. 329, 106 Pac. 908, 28 L. R. A. (N. S.) 533, which was followed in *Wolpers v. Spokane*, 66 Wash. 633, 120 Pac. 113, is relied on by appellant. It was said in the *Giuricevic* case that the *Postel* case is "distinguishable." This is repeated in the *Wolpers* case. These cases go no further, as is said in the *Wolpers* case, than to hold that the charter provision will not be held to apply where the relation of master and servant exists.

The decision of the lower court seeming to be in harmony with previous pronouncements of this court, its judgment is affirmed.

GOSE, PARKER, and CROW, JJ., concur.

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[No. 10096. Department One. July 29, 1912.]

THEODORE ANDERSON, *Respondent*, v. CHARLES P.

SPRIESTERSBACH *et al.*, *Appellants*.<sup>1</sup>

ABSTRACTS OF TITLE—LIABILITY FOR NEGLIGENCE. Where an abstracter of titles knows that the party to whom he delivered an abstract, at the instance of the owner who ordered and paid for it, will rely upon it in making a trade or purchase of property, he is liable to such party in damages for a loss resulting from a material error or omission.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 7, 1911, upon granting plaintiff's motion for nonsuit at the close of defendants' case, in an action on contract. Reversed.

*Cooley & Horan* and *R. Mulvihill*, for appellants.

*Coleman, Fogarty & Anderson*, for respondent.

<sup>1</sup>Reported in 125 Pac. 166.

CHADWICK, J.—This action was brought to recover the sum of \$468.50, the price of certain abstracts made by plaintiff for defendants. The defendants answered, setting up a counterclaim for damages. A further statement of the facts is unnecessary at the present time. The legal question to be resolved is whether an abstractor, knowing that the party to whom he delivers an abstract, at the instance of the owner who ordered and paid for it, will rely upon it in making a trade or purchase of the property described therein, is liable in damages for a loss resulting from a material error or omission. The trial judge applied the rule as laid down in 1 Cyc. 215:

“By the weight of authority an abstractor is liable only to the person ordering and paying for the abstract; and where this view obtains, the fact that an abstractor has knowledge that his abstract is to be used in a sale or loan to advise a purchaser or a person about to lend money does not affect the rule as to his liability.”

This rule is sustained by the weight, considered in numbers, of authority; but we are not willing to apply it, unless it is plain that there was no duty on the part of the abstractor to the party injured. In this case the abstractor not only knew the purpose of the abstract, but became the agent of the other party to the transaction, out of which the loss resulted, to deliver it to defendant. He knew that the trade, if made at all, would be made upon the faith of his certificate.

What is called the general rule has not been allowed to stand without strong and persistent challenge. In one of the leading cases, *Savings Bank v. Ward*, 100 U. S. 195, the doctrine was denied by Chief Justice Waite, dissenting, with whom Justices Swayne and Bradley concurred. He said:

“The circumstances were such as ought to have satisfied him that his certificate was to be used by Chapman in some transaction with another person as evidence of the fact certified to. . . . It seems to me that under these circumstances Ward is liable to the bank for any loss it may sustain by reason of his erroneous certificate.”



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Like expressions are to be found in many of the cases. In some states the injustice of the rule invoked by plaintiff has been recognized by the legislature and abrogated by statute. We are not now prepared—indeed it is not necessary—to hold that an abstractor is liable to a third party to whom his customer presents an abstract in the procurement of money or property. The general rule was recognized, if not expressly affirmed, in *Bremerton Dev. Co. v. Title Trust Co.*, 67 Wash. 268, 121 Pac. 69, where a recovery was allowed upon our finding of strict privity of contract, but it does not follow that there are no exceptions to the rule. Indeed, they have been recognized, and in our judgment are as securely established as the rule itself. So where, as in this case, the facts warrant us in saying that there was a republication of the abstract to the defendant, or that it was made in his behalf, we have no hesitation in asserting that the abstractor is responsible under his certificate for the loss sustained.

“It is very well known that the owner of real estate seldom incurs the expense of procuring an abstract of the title from an abstractor, except for the purpose of thereby furnishing information to some third person or persons who are to be influenced by the information thus provided. If the abstractor in all cases be responsible only to the person under whose employment he performs the service, it is manifest that the loss occasioned thereby must in many cases, if not in most cases, be remediless. Where the abstractor has no knowledge that some person other than this employer will rely in a pecuniary transaction upon the correctness of the abstract, the general rule that his duty extends only to his employer must be maintained. How far exceptions ought to be countenanced, we will not now undertake to say, but, confining ourselves to the case before us, we are of the opinion that the facts stated in the complaint are sufficient to put the defendant to his answer. Here there was actual communication between the abstractor and the person for whose information the abstract was prepared. The appellant had refused to make the loan until he should be furnished with an abstract, and the abstractor was informed that his abstract was to be used for the particular purpose of inducing

the plaintiff to make a loan secured by mortgage on this real estate. He delivered the abstract to the appellant for his use, and certified it to be a correct and true abstract of title; . . . We think it cannot properly be said that the appellee did not owe a duty to the appellant arising under the contract, the attending circumstances indicating that it was the understanding of all the parties that the service was to be rendered for the use and benefit of the appellant, the particular person who was to loan his money in reliance upon what the abstracter should do and represent in the premises. If such a duty did arise, the appellee was bound to the person to whom he owed the duty to perform it with reasonable care and skill. However broad and inclusive the statements of the general doctrine in the decided cases, we think that when the facts involved, and the reasons stated in the opinions, to some of which we have referred, are considered, it must be concluded that the view we take of the pleading before us is sustained by the authorities." *Brown v. Sims*, 22 Ind. App. 317, 53 N. E. 779, 72 Am. St. 308.

"The defendant knew that the abstract was made for the exclusive benefit and use of the plaintiff, and knew that the plaintiff would rely thereon, and the abstract was delivered by the defendant to the plaintiff. Under this state of facts, there can be no doubt as to the liability of the defendant." *Western Loan & Savings Co. v. Silver Bow Abstract Co.*, 31 Mont. 448, 78 Pac. 774, 107 Am. St. 435.

It is inferentially held in *Savings Bank v. Ward*, *supra*, that, had the abstracter had "any knowledge as to the purposes for which the abstract was obtained," he would have been liable to one acting upon its credit; while in other cases it has been squarely held that, where the abstracter has notice that the abstract is procured for a particular person or use, he will be held liable to such person for damages caused by his negligence or omission. *Dickle v. Nashville Abstract Co.*, 89 Tenn. 431, 14 S. W. 896, 24 Am. St. 616; *Peabody Bldg. & Loan Ass'n v. Houseman*, 89 Pa. St. 261, 33 Am. Rep. 757; *Equitable Bldg. & Loan Ass'n v. Bank of Commerce & Trust Co.*, 118 Tenn. 678, 102 S. W. 901, 12 L. R. A. (N. S.) 449, and note; Warvelle, *Abstracts of Titles* (3d ed.), § 9.

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Other questions are raised, but in our judgment they rest upon disputed facts, and the case will be sent back for further proceedings in conformity with this opinion.

Judgment reversed.

MOUNT, GOSE, PARKER, and CROW, JJ., concur.

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[No. 10273. Department One. July 29, 1912.]

A. M. Yost, *Respondent*, v. EMPIRE STATE SURETY  
COMPANY, *Appellant*.<sup>1</sup>

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—BOND OF CONTRACTORS—DEFENSES. In an action on an indemnity bond, it is not a fatal variance that the contract provided that the work should be done under one ordinance, which ordered the improvement and the bond refers to the fulfillment of the contract under another ordinance, which provided for the plan of a special assessment, the engagement of the bond to underwrite the contract being sufficiently set out.

INSURANCE—AGENTS—SCOPE OF AUTHORITY. An adjuster of a bonding company may be assumed to have authority to bind the company by its promise to pay a claim, where he was held out by the company as its adjuster having general authority over several states, and no notice was given that he had no authority to settle claims in excess of \$250.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 28, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on an indemnity bond. Affirmed.

*John P. Hartman*, for appellant.

*George W. Louttit*, for respondent.

CHADWICK, J.—Appellant became surety for certain contractors who had undertaken to put in a sea gate at Edmonds. The contractors defaulted and the work was completed by others. The concrete question before us is the lia-

<sup>1</sup>Reported in 125 Pac. 167.

bility of appellant, the surety company. It is first contended that the contract provides that the work shall be done under Ordinance No. 180, whereas the bond refers to the fulfillment of Ordinance No. 177. It is said that this is a fatal variance because of which respondents, who performed labor and supplied materials for the work, cannot recover. Ordinance No. 180 ordered the improvement and provided that the expense should be met under a plan of special assessments, as provided by Ordinance No. 177 and the laws of the state of Washington.

Admitting that appellant was not informed as to the manner adopted for assessing the cost of the work, and this is all that was denied it by omitting reference to Ordinance No. 177, we think it would be highly technical to hold that there was a variance out of which any prejudice resulted to appellant. Its engagement was to underwrite the contract. It stipulated that the contractors would meet their engagements, and it cannot complain if the parties and the subject-matter of its engagement are sufficiently set out in the bond. We find the fact to be so.

It is next contended and admitted that the right of recovery, the claimants not having filed any liens, depends upon two conditions; (1) was one Mitchell an agent of the appellant with sufficient authority to bind appellant by his promise; and (2) did he make such promise. It is altogether likely that, as between appellant and Mitchell, his liberty to contract on behalf of the company was limited. It is said that Mr. Mitchell was only an adjuster of claims, and had no authority to settle or promise the payment of claims in excess of \$250. We find nothing in the record that would bring this fact home to the claimants, or even put them on notice of the fact. They or their agent, acting upon the unchallenged assumption that Mr. Mitchell in all of his negotiations had full power to meet their demands, treated with appellant. He had a general authority over the states of Washington, Oregon, and a part of California. His office

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and stationery were supplied by the defendant. On the letter heads furnished by the company his name appeared as adjuster, without notice of limited authority, and his name so appeared upon the door of his office. After this controversy arose, he entered into a minute examination of the several claims, and promised to pay them. He sought only to reject or throw out those which the company would not be legally bound to pay. Unless the transaction be of such character as to put a party dealing with a corporation upon notice, or the duty be one that the law imposes upon those higher in authority, a party dealing with its representative is warranted in assuming that he has power to terminate the relation which he assumes to negotiate. The rule and its reason are both set forth so clearly in *Brace v. Northern Pac. R. Co.*, 63 Wash. 417, 115 Pac. 841, that no further discussion is necessary.

We think the testimony is ample to sustain the verdict and the judgment of the court that Mr. Mitchell bound appellant to meet the demands of the plaintiff. There is some testimony to show an express promise, but the evidence to sustain an implied promise is so convincing that we think it would be unjust in the extreme if we should hold that those who, because of negotiations invited by appellant's agents, had let the time for protecting themselves under the statute go by, could not recover.

Judgment affirmed.

MOUNT, GOSE, PARKER, and CROW, JJ., concur.

[No. 10304. Department One. July 29, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. BARNEY  
PRIMMER, *Appellant*.<sup>1</sup>

CRIMINAL LAW—TRIAL—COMMENT ON FACTS. In a prosecution for incest, in which the female, testifying for the defendant, contradicted an affidavit previously made by her, it is unlawful comment on the facts in violation of Const., art. 4, § 16, for the court, in the presence of the jury, to order the witness into the custody of the sheriff and to direct the filing of an information against her for perjury.

Appeal from a judgment of the superior court for King county, Gay, J., entered December 16, 1911, upon a trial and conviction of incest. Reversed.

*Daniel Landon*, for appellant.

*John F. Murphy* and *Thomas J. L. Kennedy*, for respondent.

PARKER, J.—The defendant was convicted in the superior court of the crime of incest, from which he has appealed to this court. While several errors are assigned by counsel for appellant, the principal ground upon which a reversal of the judgment and a new trial is sought is that the trial court committed error prejudicial to appellant by remarks in the presence of the jury amounting to a comment upon the facts, in violation of § 16, art. 4, of our state constitution, providing that:

“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”

Appellant was accused of committing the crime with his daughter. She was called and sworn as a witness for the state, and it was evidently expected by the prosecuting attorney that she would testify to facts showing the guilt of

<sup>1</sup>Reported in 125 Pac. 158.

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her father, when the following occurred during her examination in chief:

"Mr. Kennedy, Deputy Prosecuting Attorney: Q. Directing your attention to the night of the 27th of October, were you down there at your home on Sturgis Road at that time? A. Yes, sir, I was home. Q. Was your father in bed with you at that time? A. No, he was not. Q. Directing your attention to this affidavit, is that your signature 'Josephine Primmer' there? A. Yes, sir, I signed that paper. Q. Before Mr. White—Crawford E. White? A. Yes, sir, I said that—I said he did this because I was mad. Mr. Kennedy: I will call Your Honor's attention to this affidavit (handing paper to court). Q. Which is the truth, did you or did you not, have sexual intercourse with your father? A. No, I did not. Q. You signed this affidavit before a notary? A. Yes, sir, I did; I signed it because I was mad at my father. . . . Mr. Kennedy: Your Honor, when we are through with this witness we will ask that she remain in custody, and we will file a perjury information against her. Mr. Landon [attorney for defendant]: I object to this. The Court: She will be retained. Mr. Landon: We except to Your Honor's ruling."

Thereafter, during her cross-examination, the following occurred:

"Mr. Kennedy: The witness seems to be perfectly willing to testify for counsel. Mr. Landon: I object to counsel's remarks; this witness has been called by the counsel himself. The Court: I understand that, but you have no right to go into anything except what is cross-examination. Call a deputy sheriff, if there is none here, to take her in custody. Mr. Landon: I object to that proceeding."

Thereafter when she was excused from the witness stand immediately upon the close of her examination, the following occurred:

"The Court: The deputy sheriff will take this girl, and I ask that the prosecuting attorney file a charge of perjury against her on her own admissions. Mr. Landon: We desire an exception to the court's remarks."

This all occurred in the presence of the jury. The paper shown to the witness and handed to the court by the deputy prosecuting attorney was an affidavit which purported to have been made by her, stating facts showing her father's guilt of the crime he was being tried for. The paper was not shown to the jury. It seems to us that the ordering of the witness into custody, and the remarks of the judge in connection therewith, clearly indicated his belief that the witness had committed perjury. It is insisted that the judge's remarks only indicated his belief that the witness had committed perjury in the making of the affidavit accusing her father of the crime, and was therefore favorable rather than prejudicial to him. If that was the intended meaning of the judge's remarks, the jury might well ask why did he not order appellant discharged. But whatever may be said of the intended meaning of the judge's remarks, they were manifestly expressions of opinion upon the credibility of the witness who had testified to facts tending directly to show that appellant was not guilty as charged. Many decisions of the courts of other states have been called to our attention dealing with the question of trial courts commenting upon facts; but we regard them of little aid here, in the light of the mandatory provisions of our constitution. We are of the opinion that, under our former decisions, the court's remarks in the presence of the jury upon this trial invaded the province of the jury to the prejudice of appellant, and for that reason he is entitled to a new trial. *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098; *State v. Hyde*, 20 Wash. 234, 55 Pac. 49; *State v. Crotts*, 22 Wash. 245, 60 Pac. 403; *State v. Priest*, 32 Wash. 74, 72 Pac. 1024.

The judgment is reversed, and appellant granted a new trial.

CROW, GOSE, and CHADWICK, JJ., concur.



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Opinion Per PARKER, J.

[No. 10338. Department One. July 29, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES TICE,  
*Appellant*.<sup>1</sup>

FISH—RIGHT TO FISH. There is no private right or privilege to take fish in waters of the state except as granted by the state.

CONSTITUTIONAL LAW—CLASS LEGISLATION—FISH. Laws 1911, p. 496, regulating the fishing for salmon and making a different closed season in different waters of the state is not unconstitutional as class legislation or arbitrary and unreasonable, as it affects equally and impartially all persons similarly situated.

Appeal from a judgment of the superior court for Pacific county, Smith, J., entered December 18, 1911, upon a trial and conviction of violating the law relating to the taking of food fishes. Affirmed.

*Chas. E. Miller and John A. Homer*, for appellant.

*Rob't G. Chambers*, for respondent.

PARKER, J.—The defendant was convicted in the superior court of the offense of fishing for and taking salmon from the waters of Willapa Harbor on August 10, 1911, during the closed season, in violation of the law relating to the taking of food fishes, providing, among other things, as follows:

“It shall be unlawful to take or fish for salmon in the waters of Willapa Harbor or its tributaries from the 15th day of March to the 15th day of April, and the 1st day of August to the 1st day of September and from the 5th day of December to the 5th day of January in each year.” Laws 1911, page 496.

He has appealed to this court, relying for a reversal of the judgment rendered against him upon his claim of the unconstitutionality of this law.

<sup>1</sup>Reported in 125 Pac. 168.

Counsel for appellant contend in substance that the classification of the waters of the state by the law for the regulation of the taking of food fishes is arbitrary and unreasonable, that the law deprives him of liberty and property without due process of law, and that the law denies to him equal protection and privileges with others. Counsel for appellant seem to proceed upon the theory that some inherent privilege or property right belonging to him is attempted to be invaded by this law. Let us first notice the real nature of the right of appellant which it is said this law curtails. The decisions of the courts in this country, so far as they have come to our notice, are all in unison in holding that there is no private right in the citizen to take fish or game, except as such right is either expressly or inferentially given by the state. In *State v. Snowman*, 94 Me. 99, 46 Atl. 815, 80 Am. St. 380, 50 L. R. A. 544, the court said:

“The fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof, and may permit or prohibit their taking.”

In *Smith v. State*, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404, the court said:

“The individual has no natural right to take game, or to acquire property in it, and all the right he possesses or can possess in this respect is granted him by the state.”

In *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402, 42 Am. St. 129, this view is expressed in equally strong language as follows:

“The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good.”

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Among the numerous authorities which might be cited in support of this view, the following may be noted: *Magner v. People*, 97 Ill. 320; *State v. Hume*, 52 Ore. 1, 95 Pac. 808; *Sherwood v. Stephens*, 13 Idaho 399, 90 Pac. 345; *Hornbeke v. White*, 20 Colo. App. 13, 76 Pac. 926; *Lawton v. Steel*, 152 U. S. 133; *Geer v. Connecticut*, 161 U. S. 519.

The doctrine of these holdings render it plain that no private right or privilege of the appellant is invaded by this law unless, as he contends, it grants privileges to others which are withheld from him. So far as the law relates to the right to fish in the waters of Willapa Harbor, it could hardly be seriously argued that there is any granting or withholding of privileges except as to all people upon exactly the same terms and conditions. Appellant clearly has all the rights there that any one else has under this law. But it is insisted that, since the restrictions placed by this law upon the right to take salmon from Willapa Harbor applies only to the waters of that harbor, there being other waters in the state where salmon may be taken without this same restriction as to time, the law thus becomes in effect class legislation, and as such is arbitrary and unreasonable to the extent that the court should declare it unconstitutional. Counsel's contention is, in effect, that this classification of territory has the same effect as the classification of persons. But it manifestly is not the latter. No decisions have come to our notice, and we think that there are none, holding that a legislature may not classify the territory within a state for the purpose of making different regulations or restrictions in different portions of the state relative to the taking of fish or game. It is easily conceivable that there may be sound reasons for such legislative classification, and this is sufficient to induce the courts to refrain from inquiring into the reasons moving the legislature to make such classification.

In the early case of *Hayes v. Territory*, 2 Wash. Ter. 286, 5 Pac. 927, a game law applicable only to certain counties

of the territory was attacked as being in violation of the organic law of the territory. The court there said:

"The game law in question restricted hunting in five counties only. It is contended that, for this reason, it is inconsistent with that inhibition in the organic act which forbids the legislature from granting special privileges. But the provisions of this game law fall without distinction upon all inhabitants of the territory. All are forbidden to hunt at certain seasons within the counties named. There is no special privilege, . . ."

In the comparatively recent decision by the supreme court of Oregon in *Portland Fish Co. v. Benson*, 56 Ore. 147, 108 Pac. 122, dealing with an order of the board of fish commissioners closing certain streams from fishing for a certain season, made by authority of a statute, the court said:

"Again, it is urged by plaintiffs that the order of the board denies equal protection of the law to plaintiffs in that the notice has the effect to close portions of the stream leaving other portions of it open, but this affects the locality and not the individual; where the stream is open it is open to everybody, and there is no discrimination or spoliation of property. A law that operates only in a limited territory to accomplish a specific purpose does not deny equal protection of the laws, as it affects all persons equally and impartially who are similarly situated."

*State v. Storey*, 51 Wash. 630, 99 Pac. 878, and *McKnight v. Hodge*, 55 Wash. 289, 104 Pac. 504, are in harmony with this view.

We conclude that the judgment of the superior court must be affirmed. It is so ordered.

CROW, CHADWICK, and GOSE, JJ., concur.

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Opinion Per CHADWICK, J.

[No. 10298. Department One. July 29, 1912.]

ALMA M. ROTS *et al.*, *Appellants*, v. J. H. MONOGHAN *et al.*,  
*Respondents*.<sup>1</sup>

APPEAL—REVIEW—EVIDENCE—SUFFICIENCY. A verdict will not be disturbed when still sustained by the preponderance of the evidence after appellant's propositions of law are resolved in his favor.

Appeal from a judgment of the superior court for King county, Myers, J., entered September 15, 1911, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

*Vince H. Faben*, for appellants.

*John B. Van Dyke* and *Josiah Thomas*, for respondents.

CHADWICK, J.—This action was begun against the defendants to recover damages to a certain building held by them under a lease from plaintiffs, and for the loss of a part of a certain lot of furniture stored in the building, and for damages to the remainder thereof. It is alleged that the furniture was stored in a reserved part of the building, and that defendants "broke and entered . . . and destroyed and injured" it. The answer was in the main a general denial. A further defense that defendants ceased to be tenants after the first year and surrendered the term, and that the property was held thereafter by a corporation under a tenancy from month to month by and with the consent of plaintiffs' agent, was interposed. It was also alleged the building was out of repair at the time defendants took possession, that certain alterations were made necessary on account of the character of their business, and that they were made at defendants' expense after plaintiffs had consented thereto. There is testimony tending to show that the building was in as good con-

<sup>1</sup>Reported in 125 Pac. 158.

dition when defendants and their alleged successor moved out as it was when they took possession. Also that the furniture and household goods were in the building at the time. There was no direct evidence tending to show that defendants had personally appropriated any of the personal property. The case was tried before the court without a jury, and a judgment entered in favor of defendants.

Several questions—the authority of plaintiffs' agent, defendants' surrender of the lease, and the admission of improper evidence—are discussed at some length in the briefs. But a careful reading of the record convinces us that, although the propositions of law which are advanced by appellants be resolved in their favor, there is still evidence to sustain the findings and judgment of the trial court. Therefore, treating the defendants as tenants for the full term, we hold with the trial judge that appellants failed to prove by a preponderance of the evidence that respondents are legally liable for the injury and destruction of appellants' property.

Finding no error, the judgment is affirmed.

GOSE, PARKER, CROW, and MOUNT, JJ., concur.

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[No. 10143. Department Two. July 29, 1912.]

R. F. BICKNELL *et al.*, *Respondents*, v. JAMES HENRY,  
*Appellant*.<sup>1</sup>

CHATTEL MORTGAGES—TRANSFER OF PROPERTY—ASSUMPTION OF DEBT—EVIDENCE—SUFFICIENCY. The purchaser of sheep upon which there was a chattel mortgage, is shown to have promised to pay the mortgage debt, by clear, satisfactory and convincing evidence, where it appears that he had notice of the chattel mortgage and refused to pay the price without authority from the mortgagees, who, upon request of the mortgagor, telegraphed direct to the purchaser that he had their consent to receive the sheep upon paying the balance due, that, upon ascertaining the amount and finding that it exceeded the price and claims of the herder, the mortgagor notified

<sup>1</sup>Reported in 125 Pac. 156.

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the mortgagees of such fact, whereupon the mortgagees telegraphed direct to the purchaser that they would pay his draft for the shortage, whereupon he drew a sight draft therefor and took possession of the sheep; since he acted upon the authority given, and acceptance of the proposition obligated him to pay the mortgage debt.

**FRAUDS, STATUTE OF—ORIGINAL PROMISE.** A promise by the purchaser of sheep to pay the balance due on a chattel mortgage, in consideration of the consent of the mortgagees to the transfer, is an original promise upon an independent consideration, and not to answer for the debt of another within the statute of frauds.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered September 8, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on a note and to foreclose a chattel mortgage. Affirmed.

*John E. Ryan and Grover E. Desmond*, for appellant.

*Englehart & Rigg*, for respondents.

**MOUNT, J.**—Plaintiffs brought this action to recover a sum of money alleged to be due upon a promissory note executed by defendant Homer V. Brenner, and which was alleged to have been assumed by the defendant James Henry, and to foreclose a chattel mortgage upon a band of sheep, which mortgage was given to secure the note. The other defendants were alleged to have or claim some interest in the sheep, but that such claim was subject to plaintiffs' claim. The principal issue in the case was upon the assumption of the debt. The trial court found in favor of the plaintiffs, and entered a judgment accordingly. The defendant James Henry only has appealed.

The facts are as follows: On May 21, 1910, the plaintiffs sold and delivered to Homer V. Brenner, at Heppner, Oregon, a band of 2,600 sheep for \$8,250. Fifty dollars of the purchase price was paid in cash, and a note due in seven months secured by a chattel mortgage upon the sheep was given by Brenner to plaintiffs for the balance. The mortgage recited that the sheep were "to be trailed to and run

in Yakima county," in this state. Thereafter the sheep were driven into Yakima county, and about the same time, namely, on the 25th day of May, 1910, the mortgage was filed for record in Yakima county. The mortgage did not contain an affidavit that it was made in good faith. The note for \$8,200 was placed for collection in the Citizens National Bank, at Baker, Oregon, by the plaintiffs, who reside in Chicago.

On December 10, 1910, Mr. Brenner agreed to sell 2,300 of the sheep to the defendant Henry for \$4.50 per hundred-weight. Five hundred dollars was paid to Brenner upon this contract of purchase, by C. C. Churchill, who was agent for Mr. Henry. This contract was in writing, and provided: "Said sheep to be fat and in merchantable condition. Sheep to be delivered and weighed at Toppenish by February 1. Sheep not to be fed or watered after leaving yard at Outlook before being weighed. No sheep to be accepted by Churchill unless fat." Thereafter, on December 22, 1910, 460 head of sheep were delivered to Mr. Churchill for Mr. Henry, and the price thereof, \$2,066.40, was paid to Brenner. One thousand three hundred and five dollars of this was thereupon applied upon the note. At this time it does not appear that Mr. Henry or his agent, Churchill, had actual notice of the mortgage. Thereafter, on February 6 and 9, 1911, the balance of the sheep were taken to the stock yards of the railway company to be delivered to defendant Henry. His agent, Mr. Churchill, was then informed of the mortgage, and refused to receive or pay the purchase price of the sheep without authority from the plaintiffs. Mr. Brenner then sent a telegram to Mr. Bicknell at Chicago as follows: "Wire C. C. Churchill authority to receive sheep. Rush answer." In response to this telegram, the plaintiff Mr. Bicknell answered on the same day, February 9, direct to Mr. Churchill, as follows: "By paying balance due Citizens National Bank, Baker, Oregon, you have our consent to receive Brenner sheep." Mr. Churchill thereupon, on the same



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day, sent a telegram to the bank, as follows: "What is balance due you from Homer Brenner? Wire quick." The bank replied to Churchill on the same day: "Brenner balance on note \$7,372." Mr. Churchill thereupon calculated that, with the money already paid to Brenner and with the amount of the note, the sheep would cost him "\$88 and something" more than he had agreed to pay for them. The herder, one Mr. Verling, also had a claim of \$411 against the sheep, and refused to release them until his claim was paid. Thereupon, on February 10, 1911, Mr. Brenner sent a telegram to the plaintiff Bicknell as follows: "Sheep lacks \$499 enough to pay herder and mortgage. Herder is holding sheep here. Wire satisfaction." Thereupon Mr. Bicknell answered to Mr. Churchill: "Will pay your draft on Bicknell & Gemmell, care Clay-Robinson Company, Chicago, for amount Brenner shortage up to \$500." Mr. Churchill then drew a sight draft upon the plaintiffs in favor of Mr. Verling for \$411, and this draft was subsequently paid by the plaintiffs. Mr. Verling released the sheep, and they were taken over by Mr. Churchill for Mr. Henry, on February 10 or the morning of the 11th, 1911.

After the sheep had been delivered to Mr. Churchill, defendant Yost brought an action against Mr. Brenner and sued out a writ of attachment. The sheriff seized 460 of the sheep in possession of defendant Henry, or his agent, Mr. Churchill, and afterwards the sheriff sold the same and they were purchased by Mr. Yost. Upon the question of Mr. Yost's interest in the sheep, the trial court concluded that defendant Yost acquired no right, title, or interest in the sheep, and that the sale by the sheriff to Mr. Yost conveyed no right, and that Yost is holding the sheep in his possession. Neither Mr. Yost nor the sheriff has appealed, and the judgment is conclusive as to them. After the sheep were delivered to defendant Henry or his agent, he refused to pay the note, whereupon this action was brought. In his answer Henry denies that he assumed and agreed to pay the

note, but alleges that he purchased the sheep and owes thereon \$5,372.83, after deducting for certain expenses on account of this litigation, and that he is willing to pay this sum to whom the court shall direct.

Appellant argues in his brief, that the chattel mortgage is void; that he is a subsequent purchaser in good faith; that his agent, Churchill, was a special agent and had no authority to assume obligations without express instructions, and that in fact there was no assumption of the debt by the defendant Henry or his agent. This last question is the one which controls the case. The others are mere incidental or collateral questions. As between the mortgagor and the mortgagee, the mortgage was no doubt a valid one. The agent of Mr. Henry knew of the mortgage before the sheep were delivered to him or paid for. He was therefore a purchaser with notice. He had authority to purchase the sheep and to obligate his principal for the purchase price. There is no dispute upon that point. After he learned of the mortgage upon the sheep, he requested the mortgagor to obtain authority from the plaintiffs, who were mortgagees, to release the sheep or to permit a delivery to the purchaser. Mr. Brenner then sent a message to Mr. Bicknell, saying: "Wire C. C. Churchill authority to receive sheep. Rush answer." The answer came: "By paying balance due to Citizens National Bank, Baker, Oregon, you have our consent to receive Brenner sheep." Mr. Churchill then was informed of the amount and thereupon took the sheep.

It is plain that Mr. Churchill knew of the claim of the plaintiffs upon the sheep, knew the amount of the claim, and that the telegram was a refusal to permit delivery of the sheep unless the claim was paid or assumed. He thereupon took the sheep. It is true he made no verbal or written promise to assume or pay the note, but he quietly took the sheep. He acted upon the authority of the telegram, and is bound thereby as much so as if he had answered back in writing: "I will take the sheep and pay the note." Be-

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fore he took the sheep it appears that the herder made a claim of \$411 for herding charges. This herder refused to permit the delivery of the sheep until his claim was paid. Thereupon Mr. Churchill calculated what the purchase price of the sheep would amount to, and found that, with the payments already made to Mr. Brenner, the mortgagor, and with the amount due upon the mortgage, he would be required to pay "\$88 and something" more than he had agreed to pay for the sheep, and besides this, the herder claimed \$411. Mr. Brenner then wired the mortgagee: "Sheep lack \$499 enough to pay herder and mortgage. Herder is holding sheep here. Wire satisfaction." Thereupon the mortgagors answered direct to Mr. Churchill, authorizing him to draw a draft for the shortage up to \$500. Churchill thereupon drew a draft for \$411, and the herder was therewith paid. This money was paid by the plaintiffs in order that delivery of the sheep might be made, and that the purchaser might pay or assume the amount of the note and mortgage against the sheep, viz., \$7,372.

While the rule is that the promise to pay or assume a debt "must be clear, satisfactory and convincing" (*Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 52 Pac. 228, 63 Am. St. 892), the facts stated above plainly bring the promise within that rule. The fact that Churchill took the sheep after the mortgagee had told him he could do so by paying the balance due upon the note and mortgage was sufficient. He could not act upon that offer and remain quiet, and then be heard to say that he did not promise to pay. As we said in *Gay v. Schaefer*, 52 Wash. 269, 100 Pac. 334:

"It is not claimed that the promise was in writing and it is not necessary that it should be. This is not a mere promise to answer for the debt of another. The promise was made upon consideration that the respondent would consent to a transfer of the mortgaged property from Frost to the promisor. Consent was given by the respondent, and the transfer was thereupon made. The debt thereby became

the debt of the promisor, and is not within the statute of frauds."

The same is true in this case. Mr. Churchill did not strictly assume the debt of another. He bought the sheep and created a debt of his own and of his principal, which has not yet been paid. That debt was the promise to pay the note and mortgage held by the bank. He was dealing for his principal, Mr. Henry, directly with the plaintiffs, and it was clearly understood that he should pay for the sheep by paying the note at the bank at Baker, Oregon. He did not do so, but still retains the sheep and the purchase price.

The judgment was right, and it is therefore affirmed.

PARKER, ELLIS, and MORRIS, JJ., concur.

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[No. 10168. Department Two. July 29, 1912.]

L. V. M'WHORTER *et al.*, Respondents, v. FORNEY BROTHERS  
& COMPANY, Appellant.<sup>1</sup>

HIGHWAYS—WHAT CONSTITUTES—PRESCRIPTION. Roads across unimproved arid lands become public highways by user, where they were well defined and commonly traveled for more than thirty years, the county officers repaired and improved them within the last five years, and the public used them continuously as public highways for many years.

VENDOR AND PURCHASER—INCUMBRANCES—RESCISSION BY VENDEE—HIGHWAYS. Public roads across a tract of land which are shown to be an injury and not a benefit to the land, decreasing the value \$50 per acre, are incumbrances, and a purchaser is not thereby estopped to rescind the sale on account of knowledge of the roads, where he did not know that they had become public highways by prescription.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered July 1, 1911, upon findings in

<sup>1</sup>Reported in 125 Pac. 164.

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favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

*Roberts & Udell* and *A. R. Peaks*, for appellant.

*Wende & Taylor*, for respondents.

MOUNT, J.—On January 26, 1910, plaintiffs and defendant entered into a written contract, by which the plaintiffs agreed to purchase from defendant twenty acres of land in Yakima county. The purchase price of the land was \$5,500, \$2,500 of which was paid in cash and the balance was to be paid in installments, \$1,000 on or before one year, \$1,000 on or before two years, and \$1,000 on or before three years from the date of the contract, deferred payments to bear eight per cent interest per annum. Upon the payments being made, the defendant was to convey the land to the plaintiffs by a general warranty deed with an abstract of title.

In December of 1910, plaintiffs tendered the whole balance due, and demanded a deed as provided for in the contract. The defendant executed and tendered a deed, which the plaintiffs refused to accept for the reason that two public highways extended across the land, one of these highways being thirty feet in width, crossing the land from north to south about 300 feet west of the east line, and the other being about fifteen feet in width and crossing the land diagonally from near the southeast corner to the northwest corner, so that these roads divided the land into three irregularly shaped tracts. When the defendant tendered the deed, a demand was made by the plaintiffs that these roads should be removed, for the reason that they constituted an incumbrance upon the land. The defendant refused to have the roads removed or vacated, and thereafter the plaintiffs tendered a quitclaim deed to the defendant, and demanded a return of the money paid upon the contract. The defendant refused to comply with this demand, and this action followed. At the trial of the case, the court found, among other

facts, the following, which appear to be in accord with the evidence:

"(6) That at the time of the execution of said contract and ever since and now there exists over and across said land two traveled roadways, both of which had been used as a highway by the public generally, openly, notoriously, continuously and adversely for a period of over twenty years prior to the date of said contract. . . .

"(7) That at the time of making said contract and ever since said land was covered with a growth of sagebrush varying from two to three feet in height, except on that portion of said land included within said roadways.

"(8) That within seven years last past the county of Yakima has spent public money on each of said roads in the construction of culverts and bridges across the same.

"(9) That prior to the making of said contract the plaintiff examined said land with a view of purchasing same, and at the time of said examination the said roads and each of them were plainly visible, and were either seen by the plaintiffs, or would have been seen and observed by them by the exercise of proper diligence.

"(10) That the public acquired a prescriptive right and there existed a prescriptive right in the public to travel said roads and each of them at the time of making said contract.

"(11) That the existence of said prescriptive right in the public to travel said roadways and each of them depreciates the value of said land to the amount of fifty dollars per acre. . . .

"(12) That the plaintiffs and neither of them were aware that the public possessed a prescriptive right or any right to travel said roadways or either of them over and across said land at the time of the execution of said contract, and they and each of them were unaware of the possession by the public of any right whatsoever, either prescriptive or of any other character, to travel said roadways over and across said lands, and were aware only of the physical existence and not the legal existence of said roads."

The court concluded from these findings that the roadways across the land are incumbrances, and that, the defendant having declined to remove the same, the plaintiffs were entitled to a return of the purchase money paid. The judg-

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ment was accordingly entered against the defendant, and this appeal followed.

Several assignments of error are made, but the argument is to the effect, (1) that the evidence fails to show that these roads are lawful highways, and (2) that highways do not constitute an incumbrance on land, and therefore the defendant complied with its contract when it tendered the warranty deed to the plaintiffs. We shall notice these points briefly. The record shows that these roads are not regularly laid out roads, and that the tract of land in question is open, unimproved, arid land. But it also shows that the roads are well defined roads, and have been commonly traveled for more than thirty years, that they were used as such long before the patent for the land was issued by the government, and that the county officers have made repairs and improvements upon these roads and upon the lands in question within the last five years, and that the appellant knew of these facts. It is apparent from the evidence that the county officers regarded these roads as public highways and improved them as such, and that the public used them continuously as such for many years. They therefore became highways by user. *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411.

Upon the second point, appellant argues that, if these roads are held to be highways, they do not constitute an incumbrance upon the land, because they are a benefit, and also because the plaintiffs knew of the roads at the time the contract for purchase was entered into. Many cases are cited and quoted, from among which is *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272, where the court said:

"It must strike the mind with surprise, that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road, and who chooses to have it included in his purchase, shall turn

round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm. It is hazarding little to say, that such an attempt is unjust and inequitable, and contrary to the universal understanding of both vendors and purchasers. If it could succeed, a flood-gate of litigation would be opened, and for many years to come, this kind of action would abound. These are serious considerations, and this court ought, if it can consistently with law, to check the attempt in the bud."

Appellant also relies upon the case of *Schurger v. Mooreman*, 20 Idaho 97, 117 Pac. 122, 36 L. R. A. (N. S.) 313. We have no doubt that, where the road or highway is really a benefit to the land, it could not be held to be an incumbrance; but where there are two roads which are shown to be a source of injury to the land, as is the case here, it is apparent that a different rule applies; or, stated in the language of Mr. Rawle in his work on Covenants for Title (5th ed.), page 108:

"Instead, therefore, of laying down an abstract rule, it would seem that in a certain class of cases the question of what is or is not an incumbrance should, as has already been said, be determined by reference to the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser and to some extent the local usage and habit of the country; . . ."

In other words, the question in this kind of cases becomes a mixed question of law and fact.

It appears in this case that the respondents knew that these roads were upon the land when they entered into the contract, but they did not know until later that the roads had become an incumbrance by use or prescription. The character of the country and of the roads led them to believe, and they no doubt did believe, that the roads were mere temporary roads, and could be obstructed or changed without permission of the county officers and without liability. When they subsequently discovered that the course



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of the roads could not be changed without permission, they demanded that the defendant remove the roads because they constituted an incumbrance, which they really are because the court finds that the value of the land is decreased \$50 per acre on account thereof. If the plaintiffs had known or been informed that the roads were lawful roads, or that they had been used long enough to become such at the time the contract was made, the plaintiffs might now be estopped to claim that the roads are incumbrances, but not knowing that fact, they are not estopped.

The judgment is therefore affirmed.

MORRIS, ELLIS, FULLERTON, and GOSE, JJ., concur.

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[No. 10221. Department Two. July 29, 1912.]

ROBERT M. HAYNES, *by his Guardian etc., Respondent*, v.  
THE CITY OF SEATTLE, *Appellant*.<sup>1</sup>

NEGLECT—THINGS ATTRACTIVE TO CHILDREN—MUNICIPAL CORPORATIONS—STREETS—LIABILITY. The fact that a street was safe for ordinary use does not release a city from liability for a condition dangerous to children of tender years attracted to the place through work negligently carried on by the city.

SAME. It is negligence for a city in stringing wires on poles in front of the play grounds of a public school to unwind a coil of wire without guard or watch of any kind where children of tender years would be attracted to the danger.

APPEAL — REVIEW — HARMLESS ERROR—ADMISSION OF EVIDENCE. Error in the admission of evidence in a case tried by a court without a jury is harmless, where no finding is or need be predicated thereon.

DAMAGES—EXCESSIVENESS—PERSONAL INJURIES. A judgment for \$800 for injuries sustained by a school boy is not excessive, where he was severely bruised and suffered considerably temporarily and was unable to pass his grade at the end of the school year.

Appeal from a judgment of the superior court for King county, Main, J., entered November 18, 1911, upon findings

<sup>1</sup>Reported in 125 Pac. 147.

in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for personal injuries. Affirmed.

*James E. Bradford and William B. Allison*, for appellant.  
*E. H. Guie*, for respondent.

FULLERTON, J.—The respondent, a minor of the age of nine years, brought this action by his guardian against the city of Seattle to recover for personal injuries. At the time he received his injury, the respondent was attending one of the primary public schools of the city of Seattle. The land upon which the school building was constructed abutted upon a street known as Eleventh avenue north, the land opening directly upon the street, no fence or barriers of any kind being erected to separate the one from the other. On the day of the accident, a force of men working for the city were engaged in stretching electric light wires on poles set on the margin of the street. One such pole was set in the street near the corner of the land on which the schoolhouse stood. In the performance of their work, the workmen placed at the foot of this pole a coil of wire, passing one end of the wire over a cross-arm fastened to the top of the pole some 35 feet from the ground. The wire was then loosely strung for some distance over other poles set along the street, where it was fastened to a cable. A team of horses was hitched to the end of the cable and the wire strung by the horses pulling the same along as desired. As the wire was pulled, it would unwind from the coil and pass over the cross-arm. This work was going on at the time of the afternoon recess of the school, when the respondent with boys of his age were let out of the school building. The boys were attracted to the moving wire and gathered around the same. What happened thereafter is well described by the respondent himself in the following language:

“I was playing around there and a lot of the other boys were playing around there, too, and they grabbed hold of

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the wire, and were hoisting themselves up a little ways, then they would jump down from it. They did that for awhile, then I did that. Then I heard the bell ring and I jumped down and started to run for the line, get in line, and I stepped in the middle of the coil. The wire wrapped around my leg, it brought me 'way up, about half way up. Then it stopped awhile and then I went over the pole. I tried to hang on to the top, but I couldn't do it, it was too strong."

In the manner thus described, the respondent received the injuries for which he sues.

At the time of the accident, the employees of the city engaged in stringing the wires were all at some distance from the place of its occurrence, none of them in fact being close enough to be a witness thereto. The case was tried by the court sitting without a jury, and resulted in findings to the effect that the injury was the result of negligence on the part of the city. Damages were assessed in favor of the respondent in the sum of \$800. The city appeals.

The appellant challenges the sufficiency of the evidence to sustain the judgment. It contends that it is without liability for the accident, for the reason that the injured respondent was using the street at the time of the injury as a place in which to play, and that the city's obligation to keep its streets free from obstructions extends only to travelers thereon, or persons using them for some other lawful purpose, not to persons whose sole object is amusement or play.

Some of the cases cited by the appellant maintain this doctrine when applied to injuries received from mere defects or obstructions in the street, although we think it may be questioned whether they state the general rule even when thus limited. But the facts of the case at bar bring it within another principle. A child of tender years who meets with an injury upon the streets or upon the premises of a private owner, though a technical trespasser, may recover for such injury if the thing causing it has been left exposed and unguarded near the playgrounds or haunts of children and is

of such a character as to be alluring or attractive to them, or such as to appeal to childish curiosity and instincts; this on the principle that children of tender years, "being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers and mere licensees." *Iwaco R. & Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747, 96 Am. St. 902, 60 L. R. A. 793; *McAllister v. Seattle Brewing & Malting Co.*, 44 Wash. 179, 87 Pac. 68; *Akin v. Bradley Engineering & Machinery Co.*, 48 Wash. 97, 92 Pac. 903, 14 L. R. A. (N. S.) 586; *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140, 27 L. R. A. (N. S.) 884.

There can be no question as to the alluring character to the childish mind of the work here being carried on by the city's employees. The unwinding of the coil of wire in the manner in which this one was unwound was particularly so, and to do the work in front of the playground of a public school swarming with children of tender years, without watch or guard of any kind, was negligence of the grossest sort, and renders the city liable for any injury occurring by reason thereof.

It is next objected that the court erred in admitting in evidence the declarations of the foreman in charge of the work on behalf of the city, concerning the city's relation to the work then being carried on. But whether this evidence was competent or not is of little moment as the case stands here. There was abundant evidence in the record to show that the city itself was performing the work, and that it was liable for the injury to the respondent if liability therefor existed against any one; there was in fact no contest over the question in the court below. Of course, the appellant does not contend that a case tried before the court without a jury, which is triable *de novo* in this court on the record, is reversible for errors in the admission of evidence, where

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no finding is or needs be predicated upon the erroneously admitted evidence.

Finally, it is contended that the assessment of damages is excessive. But while the boy suffered no permanent injury, he was severely bruised and suffered considerably temporarily. Moreover, it is made clear by the testimony of his teacher that he did not do well for a time thereafter in his studies, and did not pass his grade at the end of the school year. We do not, therefore, find the judgment excessive, and it will stand affirmed.

ELLIS and MOUNT, JJ., concur.

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[No. 10545. Department One. July 30, 1912.]

THE CITY OF HILLYARD, *Appellant*, v. BOARD OF COUNTY COMMISSIONERS OF SPOKANE COUNTY, *Respondent*.<sup>1</sup>

ELECTIONS — ELECTION PRECINCTS — ESTABLISHMENT — STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 7678, in the act entitled an act providing for the organization and government of municipal corporations, which provides that all elections in cities of the third class shall be held in accordance with the general election laws of the state so far as applicable, that the city council shall give notice of such election, etc., and establish election precincts, has reference only to municipal elections, and therefore does not conflict with Rem. & Bal. Code, § 4798, which provides that the county commissioners shall divide the county, including all cities except cities of the first class, into election precincts, based on the number of votes cast at the last general election.

APPEAL AND ERROR—REVIEW—MOOT QUESTION. Upon a controversy between the county commissioners and a city of the third class, over the right of the commissioners to establish election precincts in the city for the purpose of general elections, the supreme court will not, at the instance of the city, determine whether the commissioners' action is binding upon the city as to its municipal elections, as the same is a moot question in which the commissioners have no interest.

<sup>1</sup>Reported in 125 Pac. 363.

Appeal from a judgment of the superior court for Spokane county, Miller, J., entered May 23, 1912, in favor of the defendant, upon an agreed statement of facts, sustaining the action of county commissioners in establishing election precincts. Affirmed.

*Thos. P. Ferry* (*Chas. W. Gillespie*, of counsel), for appellant.

*John L. Wiley* and *O. J. Saville*, for respondent.

PARKER, J.—The plaintiff is a city of the third class situated in Spokane county. It seeks to have annulled and declared void the action of the county commissioners of that county establishing election precincts within its corporate boundaries. From a judgment of the superior court in favor of the validity of the action of the county commissioners, the city has appealed.

The cause was an agreed case in the superior court. On November 11, 1910, the county commissioners established election precincts within the boundaries of the city, acting under the provisions of Laws of 1907, p. 242, Rem. & Bal. Code, § 4798, providing, among other things, as follows:

“The board of county commissioners of each county in the state shall, at their first session after the taking effect of this act, divide their respective counties into election precincts, and establish the boundaries of the same. Such board of commissioners shall designate one voting place in each precinct and each precinct shall contain two hundred and fifty electors or less, based on the number of votes cast at the last general election; but no precinct shall contain more than three hundred electors. If at any election hereafter three hundred or more votes shall be cast at any voting place, it shall be the duty of the inspector in such precinct to report the same to the board of county commissioners, who shall, at their next regular meeting, divide such precinct as nearly as possible so that the new precincts formed thereof shall each contain two hundred and fifty electors, as nearly as practicable: Provided, That in cities of the first class, the duties herein conferred upon the county commissioners shall be per-

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formed by the city council of such city; and reports of inspectors herein provided for shall be made to such city council."

This was enacted as an amendment to the general law regulating voting at state and other elections (Laws of 1890, p. 400), the only change being the adding of the proviso relating to cities of the first class. The original act made no exception, in terms, as to the establishing of election precincts by the commissioners in cities or towns. In January and July, 1911, the city passed ordinances establishing election precincts within the city, the boundaries of which precincts did not conform to those theretofore established by the county commissioners. In the passage of those ordinances the city acted under the powers conferred by the general law providing for the organization and government of municipal corporations (Laws of 1890, pp. 131-215), which provides, among other things, relating to cities of the third class, as follows:

"All elections in such city shall be held in accordance with the general election laws of the state, so far as the same may be made applicable, and no person shall be entitled to vote at such election unless he shall be a qualified elector of the county and shall have resided in such city for at least thirty days next preceding such election. The city council shall give such notice of each election as may be prescribed by ordinance, shall appoint boards of election and fix their compensation, and establish election precincts and polling places, and may change the same: Provided, That no part of any ward less than the whole thereof shall be attached to any other ward or part thereof in forming election precincts." Laws of 1890, p. 181, § 110 (Rem. & Bal. Code, § 7678).

It is contended by counsel for the city that the law last above quoted conferring power upon its council to establish election precincts within the city is a special law, in so far as it relates to elections, and that it is therefore not repealed, or its force in any way impaired, by the general election law or amendment thereto above quoted, notwithstanding such

amendment was subsequently enacted. If the law giving the city the power to establish election precincts purported to give power to establish such precincts for the purpose of state and county elections as well as for municipal elections, there would be a conflict in these laws calling for our decision thereon in this case. We are of the opinion, however, that the power given to the city council has no relation to any elections save municipal elections. The act in which the power is found is entitled:

“An act providing for the organization, classification, incorporation and government of municipal corporations, and declaring an emergency.” Laws of 1890, p. 131.

We need not now determine the sufficiency of this title to support some provision which might have been made in the body of the act relating to general state or county elections; but we notice the words of the title as throwing light upon the meaning of § 110 above quoted, and as indicating that the election precincts which the council is there given power to establish are precincts for the purpose of municipal elections only. Indeed, we think this is the meaning of that section suggested by its own language, aside from the language of the title and apparent purpose of the act. We conclude that the action of the county commissioners establishing election precincts within the city was within their power, and that such precincts thereby became the legally established election precincts for the purpose of state and county elections.

Some argument is made by counsel touching the question of whether or not the establishing of the election precincts by the county commissioners is binding upon the city for the purpose of its municipal elections. Counsel for the city seek our decision upon this question, to which counsel for the commissioners consent. But it seems to us this calls for our opinion upon a moot question only. We do not see how this could become a subject of controversy between the city and county commissioners. The action of the commissioners can



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be given full force and effect as to state and county elections in any event, and what further interest the commissioners have in the matter we are not able to see. Indeed, there is nothing in this record showing that they are demanding more. We think we are not called upon to determine the validity of the city ordinances establishing election precincts, except in so far as such ordinances are claimed to establish such precincts for the purpose of elections other than municipal. When some one having the right so to do challenges the validity of those ordinances as establishing election precincts for purposes of municipal elections by some proceeding in the courts, such question will be entertained.

It is not very clear from the language of the judgment whether or not the trial court intended to decide that the ordinances creating the election precincts are invalid as to municipal elections and the action of the commissioners is valid and binding as to municipal elections. We will assume that that question was not decided, in view of the fact that it would be a moot question in that court as it is here. Thus construing the judgment of the trial court, we are of the opinion that it should be affirmed. In order, however, to render the judgment certain and free from seeming to decide a question not properly in controversy, we direct that the judgment be set aside and a new judgment entered in conformity with the views herein expressed. In view of this disposition of the cause, and that it was submitted as an agreed case, neither party will recover costs in this court.

ELLIS, CHADWICK, GOSE, and FULLERTON, JJ., concur.

[No. 10367. Department Two. July 30, 1912.]

SUE I. PRIDE, *Appellant*, v. CONTINENTAL CASUALTY  
COMPANY, *Respondent*.<sup>1</sup>

**INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS.** An industrial accident policy lapses and is forfeited, where the premiums were to be deducted each month from the wages of the insured, who, for three consecutive months, quit the service and drew his full pay before the deductions could be made, giving no notice of his change in employment as required by the policy, which provided that no recovery could be had after default and prior to reinstatement.

**INSURANCE—POLICY—CONSTRUCTION—LIFE OR ACCIDENT POLICY—“INDUSTRIAL INSURANCE.”** An accident policy with premiums payable monthly, expiring one year after issuance, which made provision for weekly indemnity for disability and referred to the special class of employment in which the insured was engaged, although it also covers loss of life from “external, violent, and purely accidental means,” is an “industrial” or accident policy and not a “life” insurance policy, within the meaning of Rem. & Bal. Code, §§ 6155, and 6159, providing that no policy of life or endowment insurance, except policies of industrial insurance where the premiums are payable monthly, shall be issued unless it contains all the provisions of the entire contract including the representations made, with the application attached, and unless so attached, it shall not be considered or received in evidence; hence in an action thereon, evidence as to the insured’s assignment of his wages for the payment of premiums is admissible, although not part of the application.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 30, 1911, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on an accident insurance policy. Affirmed.

*O. C. Moore* and *John I. Melville*, for appellant.

*Roche & Onstine* (*M. P. Cornelius* and *Manton Maverick*, of counsel), for respondent.

<sup>1</sup>Reported in 125 Pac. 787.

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Opinion Per MORRIS, J.

MORRIS, J.—In this action appellant seeks to recover as beneficiary in a policy of insurance issued to her son, Elmo Pride, covering death through “external, violent and purely accidental means.” The case was tried by the court without a jury, and findings and judgment having been entered in favor of respondent, this appeal follows.

Elmo Pride was, on March 4, 1910, the day the policy was issued, an employee of the Spokane, Portland & Seattle Railway Company, as a roundhouse man, at Vancouver. The amount of the policy was \$1,000, and the annual premium \$20.40, which was to be paid in four monthly installments of \$5.10 each. To provide for the payment of this premium when due, Elmo Pride, on March 4, 1910, gave the respondent an order on the paymaster of the railway company, authorizing and requesting the railway company to pay these installments of premium to respondent, as they became due, and deduct them from his wages in the months of March, April, May and June. This order gave the character and place of his service with the railway, as did the application, and provided that, in case of any change in his employment, either as to class of service or location, prompt notice should be given. It was also provided in the policy that the application and paymaster’s order should be a part thereof, and that no recovery could be had upon the policy in case of loss incurred subsequent to a default in the payment of any installment of premium and prior to any reinstatement, which was also therein provided for. This paymaster’s order was received by respondent on March 9, and on March 11 the same was forwarded to the paymaster of the railway company for the collection of the first premium installment, which, under its terms, was payable from the March wages of Elmo Pride.

In order to facilitate the collection of the installments of premium as they became due and payable under the policy and paymaster’s order, the respondent forwarded to the railway company what is called “Paymaster’s Return List,”

giving the names of employees carrying policies, including that of Elmo Pride, with his occupation, location, head of his department, and the amount of the first installment of premium payable from his wages for the month of March. This was received by the railway company on March 22, and in the following month was returned to respondent, notifying it that no deduction could be made from the March wages of Elmo Pride, for the reason that Elmo Pride had quit the service of the railway company and had drawn all the wages due him. Respondent, during the month of April, in the exercise of the option given it in the policy, mailed a like return list to the railway company, and in due time was notified that no payments could be made because Elmo Pride was no longer in its service. Respondent thereupon marked the policy as lapsed. No further effort was made to collect the premium.

The facts as to the employment of Elmo Pride with the railway company seem to be about these: He was employed as a roundhouse laborer for twenty days in March, for which service he was, on March 22, paid the whole amount then due him, and on the same day he quit the service of the railway company. Subsequently he worked two and three-elevenths days in March in the same capacity, when he again quit the service, receiving his pay in full on April 1. He worked three days in April in the same capacity, quitting April 19, and being paid in full. On May 1 he again entered the service of the railway company as a bridge builder, and continued to so work until his death on June 7, from cause within the terms of the policy if it was then in force. No notification was given of these various changes in employment, as provided in the policy.

Upon these facts the court below found in favor of respondent, and in our judgment its ruling should be sustained. There could be no question in the mind of Elmo Pride as to the failure to pay his installments of premiums. He knew they were to be paid out of his wages. He knew the amount

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to be paid and when, and with such knowledge he in each instance quits the railway company's service before it could deduct the premium from his wages, and draws all that was then due him. He knew the premium installments were not paid out of wages earned by him in March, April, or May, and that it was impossible for the agent he had empowered to make such payments on his behalf to do so, for the reason that he had demanded and received all sums earned by him. His default was deliberate and intentional, with full knowledge of all the circumstances, and his beneficiary must abide its consequences.

The chief assignment of error upon which appellant contends for a reversal is error of the court below in receiving the application and paymaster's order as evidence, and in admitting evidence of officers of the railway company and of respondent respecting the nonpayment of premiums. This objection is based upon §§ 6155 and 6159, Rem. & Bal. Code. The first of these sections provides that:

"No policy of life or endowment insurance shall be issued or delivered in this state until . . . nor shall such policy, except policies of industrial insurance where the premiums are payable monthly or oftener, be so issued or delivered after January 1, 1910, unless it contains in substance the following provisions: . . . (3) A provision that the policy and the application therefor shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, unless a copy of such statement is contained in or attached to the policy, and that no such statement shall be used in defense to a claim under the policy unless it is contained in a written application; and a copy of such application shall be indorsed upon or attached to the policy when issued."

Section 6159 contains the following provision:

"Every policy, except industrial or those calling for premiums monthly or oftener, shall have attached thereto a correct copy of the application, and unless so attached the same

shall not be considered a part of the policy or received in evidence."

These sections are said to be decisive of the error contended, because neither the application nor the paymaster's order was attached to the policy. These sections in no way affect the right of recovery upon the policy in suit. This policy is neither a life nor endowment policy within the meaning of the law, but falls within the exception as an industrial or accident insurance policy. By its terms it expires one year after issuance, unless renewed; and while it covers loss of life from "external, violent and purely accidental means," and is therefore in one sense an insurance on life in which the payment of the insurance money is contingent upon loss of life, it is nevertheless evident that it is not such a life insurance policy as was contemplated by the legislature in the enactment of these two sections. It contains provisions for the payment of a weekly indemnity in case of accident or injury arising from numerous violent or external means. It refers to the industry and special class of employment the assured was engaged in at the time. It makes provision for his inability, because of injuries from purely accidental means, to engage in any labor or occupation. It is in every sense of the term a policy of industrial insurance, as contemplated by the legislature in excluding such policies from the provisions of the law. If this is not industrial insurance, we fail to appreciate what character of insurance should be so designated. If the legislature had in mind any distinction between life insurance and industrial insurance as those terms are used in ordinary understanding, and it is evident from making the latter class of insurance an exception to the rules governing the former class that such was the intention, then it must be evident that this policy falls within the exception, or it would be impossible to indicate to a person of ordinary understanding what was meant by the expression industrial insurance as distinguished from straight life or endowment insurance. These views, as applied to a like distinction in similar stat-

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utes, are supported by: *National Life & Acc. Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45; *Standard Life & Acc. Ins. Co. v. Carroll*, 86 Fed. 567, 41 L. R. A. 194; *National Acc. Soc. v. Dolph*, 94 Fed. 743; *Fidelity & Casualty Co. v. Dorrough*, 107 Fed. 389; *Mutual Reserve Life Ins. Co. v. Dobler*, 137 Fed. 550.

This policy is further within the exception, in that it provided for monthly payments of premium. The paymaster's order, neither within the contemplation of the law nor of the parties, could have been attached to the policy, as it must be surrendered to and retained by the railway company as its authority and justification for retaining the monthly payments from the wages of Elmo Pride and forwarding them to respondent for the benefit of the assured. It was therefore competent, under any interpretation of the law, for the officials of the railway company to testify to the receipt of this order and the reasons why it was not complied with.

We therefore concur in the findings of the lower court, and its judgment is sustained.

MOUNT, ELLIS, PARKER, and FULLERTON, JJ., concur.

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[No. 10144. Department One. August 5, 1912.]

JOHN L. THOMAS *et al.*, Respondents, v. THEODORE  
W. SPENCER *et al.*, Appellants.<sup>1</sup>

WATERS AND WATER COURSES—APPROPRIATION—RIGHT TO OBSTRUCT—DISSEIZIN—ADVERSE POSSESSION. The right to obstruct the outlet of a lake, acquired by appropriation in 1883, is lost by disseizin and adverse possession, where the dam was removed in 1892, and thereafter the shores of the lake were held in open, exclusive, notorious and adverse possession for more than ten years, and until a new dam was built in 1909, without any obstruction of the lake except by permission in 1907 for four months, and except that once each year during the rainy season, without the knowledge of the owners, a few stones and pieces of wood were thrown into the narrow out-

<sup>1</sup>Reported in 125 Pac. 361.

let of the lake (the work requiring about fifteen minutes) and removed in April or May thereafter.

Appeal from a judgment of the superior court for San Juan county, Joiner, J., entered June 27, 1911, upon findings in favor of the plaintiffs, in an action for an injunction. Affirmed.

*Hadley, Hadley & Abbott*, for appellants.

*Neterer & Pemberton*, for respondents.

Gose, J.—The litigation in this case arose out of the maintenance by the appellants of dams at the mouth of each of two small unmeandered lakes, hereafter called the upper and the lower lake. The lower dam is at the mouth of a small lagoon, an extension of the lower lake. The respondents' lands entirely surround the upper lake, and surround the lower lake except a small portion of its outlet. There is a flowing stream from the upper to the lower lake during the rainy season of the year, but no water flows therein during the summer months. A small stream of water flows from the lagoon to the appellants' sawmill. The purpose of the upper dam is to use the bed of the lake for a storage reservoir during the rainy season. In the summer season the flood water is released, thus permitting it to flow into the lower lake and lagoon as needed for the operation of the appellants' mill. The purpose of the lower dam is to raise the level of the water in the lower lake, to be diverted and used at the mill for power purposes. The maintenance of these dams operates to flood the bottom land owned by the respondents. The appellants assert the right to maintain each of these dams at their present level, contending that their predecessors in title built the dams and the mill, and appropriated the water for power purposes in 1883 or 1884, when all the land surrounding the lakes was public land of the United States, and that they have since used the water by a gravity flow for power purposes.



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The court found that the upper dam was entirely removed in 1892 or 1893; that in the winter season of each year since its removal the appellants have thrown into the bottom of the outlet of the lake some pieces of wood and rock to a height of twelve to twenty inches, thereby raising the water of the lake to a like height; that such work would require from fifteen minutes to a half hour; that they would remove the obstruction in April or May of each year; and that neither the respondents nor their predecessors in title knew of this obstruction. The court also found that the mouth of the lake was otherwise unobstructed after the removal of the dam in 1892 or 1893, until the construction of the present dam in November, 1909, except that a dam was maintained by the appellants' lessees for about four months in 1907, in accordance with an agreement between them and the respondents. The court also found, both as a matter of fact and law, that the respondents had been in the open, exclusive, notorious, and adverse possession of the upper lake and its outlet, and the land through which the outlet flows, and the land bordering upon the lake, for more than twelve years prior to the commencement of the action. The present dam was constructed in November, 1909, and the action was commenced in March, 1910. The court found further that, in the fall of 1907, the appellants without right raised the lower dam six inches higher than it had theretofore been maintained, thereby raising the water in the lagoon and lake to a corresponding level, and flooding the respondents' land. A decree was entered which provides that a mandatory injunction shall issue, requiring the appellants to remove six inches from the top of the lower dam, and requiring them to remove the upper dam so as to restore the outlet of the lake to its natural condition. This appeal followed.

The findings are amply supported by the evidence. Indeed, we think that the court might have gone farther and found from the evidence that, from 1892 to 1909, there had been no obstruction at the outlet of the upper lake, except

for a short time in 1907, when the respondents consented to a temporary interruption of the natural flow of the water at that point. Assuming that the appellants' predecessors in title acquired the right to obstruct the outlet of the lake by a prior appropriation, and that this right passed to the appellants as they contend, we are of the opinion that the right has been lost by disseizin and by the adverse possession of the respondents and their grantors for the statutory period. The court rightfully found that the respondents and their predecessors in title had been in the open, exclusive, notorious, and adverse possession of the shores of the upper lake and its outlet for more than ten years when the dam was constructed in 1909. The mere fact that the appellants once each year in the rainy season, without the knowledge of the respondents or their grantors—and they admit that they had no knowledge thereof—threw a few pieces of wood and a few stones into the narrow bed of the outlet of the lake, and removed them in April or May thereafter, did not interrupt the running of the statute. The removal of the dam in 1892 operated as a dispossession of the appellants, and a reentry to be effective had to be of such a character as to impart notice to those asserting a hostile right.

“When a party is once dispossessed it is not every entry upon the premises without permission that would disturb the adverse possession. He may tread upon his own soil, and still be as much out of possession of it there as elsewhere. An entry, to defeat a subsisting actual possession, must be with the actual intention of taking possession.

“This intention must be sufficiently indicated by words or acts, by express declaration, or by exercise of acts of ownership inconsistent with a subordinate character. Occasional or temporary intrusions upon the land will not be sufficient to interrupt the running of the statute. The acts should be open and notorious, and continue unbroken for a sufficient time to give notice to the person interested that a claim of right is intended by them.” 1 Cyc. pp. 1010, 1011, subds. b and c.

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See, also, *Moore v. Brownfield*, 7 Wash. 23, 34 Pac. 199.

The record is barren of evidence of such a reentry. The decree is affirmed.

CHADWICK, PARKER, and CROW, JJ., concur.

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[No. 10207. Department One. August 5, 1912.]

THE STATE OF WASHINGTON, *Appellant*, v. JOHN R. REESE,  
*Respondent*.<sup>1</sup>

INTOXICATING LIQUORS—OFFENSES—SALE TO INDIAN—"DISPOSING OF." One who, with money furnished by an Indian, procures intoxicating liquor and delivers the same to him, is guilty of a felony within Rem. & Bal. Code, § 6288, making it a felony to sell, give away, dispose of, exchange, or barter spirituous liquors of any kind to an Indian.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered February 7, 1912, upon sustaining a demurrer to the information, dismissing a prosecution for disposing of liquor to an Indian. Reversed.

*Ralph C. Bell*, for appellant.

PARKER, J.—The defendant was charged by information filed in the superior court, with the crime of disposing of spirituous liquor to an Indian. The only language of the information requiring our attention is the following:

"On or about the 11th day of January, 1912, in the county of Snohomish, state of Washington, then and there being, the said defendant John R. Reese, did unlawfully, and with money delivered to him and furnished him for such purpose by one Joseph Shelton, an Indian, . . . purchase of and procure from and of some person or persons unknown to your informant spirituous liquor, to wit, whiskey, for said Joseph Shelton aforesaid, and did then and there deliver to and surrender into the custody and possession of said Joseph Shelton aforesaid such spirituous liquor."

<sup>1</sup>Reported in 125 Pac. 363.

The defendant demurred to the information on the ground that it does not state facts constituting a crime. The trial court sustained the demurrer and discharged the defendant, and thereupon the state appealed to this court.

The law claimed by the prosecuting attorney to have been violated by the acts of the defendant as alleged in the information is found in Rem. & Bal. Code, § 6288, the provisions of which, so far as necessary for us to notice them, are as follows:

“Any person who shall sell, give away, dispose of, exchange or barter any malt, spirituous or vinous liquor of any kind . . . to an Indian, shall be guilty of a felony and punished therefor,” etc.

Recitals in the order of the trial court sustaining the demurrer and discharging the defendant indicate that the only question there raised was as to the meaning of the words “dispose of” as used in the law. That is, whether or not the acts charged by the information as being committed by the defendant are within the meaning of those words as used in the law. This is also the only question presented here.

It is manifest that the purpose of this law is to prevent Indians from acquiring intoxicating liquor. If it may be avoided in the manner the defendant is here charged with aiding the Indian in acquiring intoxicating liquor, then the enactment of the law was a mere waste of words. It would seem that when the legislature used the words “sell,” “give away,” “dispose of,” “exchange,” and “barter,” practically every imaginable method of an Indian acquiring intoxicating liquor was described. If the allegations of this information are true, then the defendant was the direct voluntary instrument of the disposition of the liquor to the Indian. Even assuming that the defendant was the mere agent of the Indian, and that the person from whom he purchased the liquor with the Indian’s money had knowledge of the purpose of the purchase, yet the defendant acquired possession and control over the liquor, and this possession and control he transferred

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to the Indian. Surely by that act he *disposed* of the liquor. True, he did not "sell" or "give away" the liquor; but the very fact that the legislature used the words "dispose of" in addition to "sell" and "give away" shows the intent of the legislature to include every possible subterfuge by which an Indian might acquire liquor through the voluntary act of another. This view finds support in 14 Cyc. 516, and cases there cited.

The judgment of the superior court is reversed.

GOSE, CHADWICK, and CROW, JJ., concur.

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[No. 10579. Department One. August 12, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Rufus C. Coombs et al., Plaintiff*, v. THE SUPERIOR COURT FOR KLICKITAT COUNTY, *Respondent*.<sup>1</sup>

**CERTIORARI—WHEN LIES—DENIAL OF TEMPORARY INJUNCTION—REMEDY BY APPEAL.** Certiorari does not lie to review an order denying a temporary injunction, which by statute is not appealable unless there is a finding of insolvency, the legislative intent being that such orders shall not be reviewed except on appeal from the final judgment.

Application filed in the supreme court July 29, 1912, for a writ of certiorari to review an order of the superior court for Klickitat county, McKenney, J., entered July 6, 1912, vacating an emergency restraining order and denying a temporary injunction. Denied.

*Miller, Crass & Wilkinson* (W. B. Presby, of counsel), for plaintiff.

*F. D. Allen, John R. McEwen*, and *W. H. Wilson*, for respondent.

CROW, J.—In pursuance of certain proceedings theretofore had, the city of Goldendale, a municipal corporation of

<sup>1</sup>Reported in 125 Pac. 779.

the fourth class, on May 20, 1912, awarded to J. F. Hill & Company, a partnership, a contract for the grading and improvement of certain streets. Thereafter Rufus C. Coombs and wife, owners of property within the assessment district, commenced an equitable action against the city of Goldendale and J. F. Hill & Company, in the superior court of Klickitat county, to have the contract declared void and to enjoin the defendants from proceeding with the improvement. In their complaint they alleged, for reasons which need not be here stated, that the proceedings upon which the contract had been awarded were irregular and void. On July 1, 1912, upon plaintiffs' *ex parte* application, an emergency order was made and entered, restraining the defendants from in any manner proceeding with the work of the improvement until the further order of the court, and commanding them to appear on July 6, 1912, and show cause why a temporary injunction should not be granted pending the litigation. At the time named, the parties appeared, the plaintiffs' application was heard, and the trial judge vacated the emergency restraining order and refused a temporary injunction. The plaintiffs Coombs and wife, as relators, have applied to this court for a writ of certiorari to review this order of the superior court, and to obtain an order directing that a temporary injunction should issue to preserve the status pending the litigation.

It is conceded that the relators have no appeal from the order of which they complain, as no finding of the insolvency of the respondents was made by the trial judge. Respondents now insist that this court has no authority in this proceeding to review the order of the trial judge in denying a temporary injunction. This contention must be sustained. The order of the trial judge is not appealable. If it can be reviewed at this time by this court by the writ of certiorari, there is no reason why any order denying a preliminary injunction may not be reviewed. That such an order will not

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be thus reviewed we have heretofore held in *State ex rel. Young v. Superior Court*, 43 Wash. 34, 85 Pac. 989, and *State ex rel. Mohr v. Superior Court*, 54 Wash. 225, 103 Pac. 17. In the *Young* case, after citing § 6500, subd. 8, Bal. Code, we said:

“There is no finding of insolvency in this case, and it is conceded that no appeal would lie. *Colby v. Spokane*, 12 Wash. 690, 42 Pac. 112; *Anderson v. McGregor*, 36 Wash. 124, 78 Pac. 776. Why did the legislature deny an appeal, except in cases of insolvency? It seems to us the reason is obvious. It was not because the legislature had already provided another method for the review of such orders, nor because it contemplated a different method of review in the future, but because it deemed an appeal from the final judgment, or an action at law for damages, an adequate remedy in such cases. In other words, it is plain to us that the legislature intended that such orders should not be subject to review in this court in any form, except on appeal from the final judgment. The power of this court to review interlocutory orders and the method of review are purely statutory, and when it is apparent that the legislature intended that a particular order should not be subject to review here, we are entirely without jurisdiction in the premises.”

The writ is denied.

MOUNT, ELLIS, GOSE, and PARKER, JJ., concur.

[No. 9879. Department One. August 14, 1912.]

CARL NELSON, *Respondent*, v. IMPERIAL TRADING COMPANY,  
*Appellant*.<sup>1</sup>

**SALES—CONTRACT—BREACH—DELAY IN PERFORMANCE.** Where an order for two tons of turkeys to arrive at Spokane on November 23d was accepted, the seller is bound to ship the same so that the whole lot will arrive at Spokane during business hours on the 23d; and where they were shipped in two lots so that the first lot could not arrive until the night of the 23d, the buyer is justified in rejecting them.

**SAME—WAIVER OF BREACH.** Where two tons of turkeys were ordered to arrive at Spokane on November 23d and they were shipped in two lots so that the first lot could not arrive until the night of the 23d, the buyer did not waive the breach where, upon being notified of the arrival of the first lot, he examined and immediately rejected it, without assigning any special reason.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 10, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

*Danson, Williams & Danson* (George D. Lantz, of counsel), for appellant.

*Charles P. Lund*, for respondent.

CROW, J.—Action by Carl Nelson against Imperial Trading Company, a corporation, to recover damages arising from defendant's alleged breach of its contract of purchase. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

Appellant is engaged in the wholesale fish and poultry business in Spokane. Respondent resides in Hutchinson, Kansas. The alleged contract of sale was made by the following telegrams which passed between the parties:

"Spokane, Washington, November 16th, Carl Nelson Hutchinson, Kansas. Can you ship three tons fancy dry

<sup>1</sup>Reported in 125 Pac. 777.



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picked turkeys 16 Hutchinson? Answer. Imperial Trading Company."

"November 16-07. Imperial Trading Company, Spokane, Wash. Can ship two tons dry picked turkeys 17c. Answer immediately. Carl Nelson."

"Spokane, Wash., November 16-07, Carl Nelson, Hutchinson, Kansas. Ship two tons fancy dry picked turkeys 17, arrive Spokane 23d. Acknowledge. Imperial Trading Company."

"November 17-07, Imperial Trading Company, Spokane, Washington. All right. Will ship C. O. D. Weather warm, shall I use ice? Carl Nelson."

"November 18. Carl Nelson, Hutchinson, Kansas. Ship without ice. Imperial Trading Company."

Appellant contends that instead of being fancy dry picked, many of the turkeys which respondent shipped were of inferior quality, that they did not reach Spokane within the contracted period, and that excessive shipments were made. It refused to accept the shipments. A portion of the turkeys which subsequently spoiled were condemned and destroyed. The remainder were stored, and later sold for less than the contract price. Respondent claimed damages for express charges, storage charges, loss of turkeys destroyed, and depreciation in price.

The undisputed evidence shows that, after being killed and dressed, turkeys should be permitted to cool for twenty-four hours before shipment; that when respondent received the order he had only 2,000 pounds of live turkeys on hand; that he killed and dressed these on November 18, permitted them to cool, and shipped them about 6 o'clock on the afternoon of November 19; that after receiving the order, he purchased about 3,000 pounds of live turkeys which he killed and dressed on November 19, permitted them to cool for twenty-four hours, and shipped them about six o'clock on the afternoon of November 20. These two shipments reached Spokane during the night of November 23d, and during the night of November 24th, practically one and two days later than was contemplated by the contract. The first shipment amounted

to 1,920 pounds, a little less than half the order. The second amounted to 3,100 pounds, which added to the first, exceeded the entire order by more than half a ton. Appellant contended, and introduced evidence to show, that it needed the turkeys to supply retail dealers for the Thanksgiving trade; that to supply this trade it was necessary to receive the stock not later than during business hours on Saturday, November 23d; that both shipments arrived too late for that purpose; and that appellant was unable to fill its orders. Appellant introduced further evidence to show that the turkeys were of an inferior quality and not suitable for appellant's trade; while respondent's evidence was that when shipped, the turkeys were all of the quality ordered, well packed, and in good condition.

Appellant's principal contention is that the trial court erred in denying its challenge to the sufficiency of the evidence, and its motion for judgment notwithstanding the verdict. It insists that respondent's duty was to deliver an entire shipment of two tons at Spokane, not later than during business hours on November 23d; that he failed to do so; that the shipments were made too late; that he finally shipped more turkeys than were ordered; that the turkeys were of an inferior quality; and that by reason of any one of these breaches, appellant was entitled to reject the entire shipment. Respondent insists that appellant's only assigned reason for rejecting the turkeys, was that they were of an inferior quality; that by assigning that exclusive reason, it waived other objections now urged; that by their verdict the jury found the turkeys were of the quality ordered; and that the judgment should be affirmed.

In considering appellant's challenge to the sufficiency of the evidence, and its motion for judgment notwithstanding the verdict, we proceed upon the theory that the turkeys were of the quality ordered. The evidence on that issue was conflicting, and was resolved by the jury in respondent's favor. It is conceded, and respondent testified, that the first

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shipment was made from Hutchinson on November 19, about 6 p. m., that the second was made on November 20 about 6 p. m., and that it would require at least four nights and three days for transportation to Spokane. Some question is raised as to whether delivery was to be made in Hutchinson or in Spokane. Appellant contends that delivery was to be made in Spokane; that it was respondent's duty to deliver the entire shipment there not later than during business hours on Saturday, November 23d; that time was a material and vital element of the contract; and that appellant was entitled to reject the entire shipment for respondent's failure to make a prompt delivery, as well as for other reasons.

We hold the contract contemplated that the delivery was to be made by shipment at Hutchinson, in time for arrival in Spokane not later than November 23d, and during business hours of that day. Appellant was not advised of the arrival of the first shipment in Spokane until the morning of Sunday, November 24th.

"In the absence of any provision in the contract fixing a place for delivery the general rule is that the delivery shall be made at the place where the goods are at the time of the sale, and this will usually be the place of business of the seller, or of manufacture, or of shipment." 35 Cyc. 172.

"Ordinarily a delivery of goods by the seller to the carrier designated by the purchaser, or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser, is a delivery to the purchaser, the carrier becoming the agent or bailee of the buyer." 35 Cyc. 193, and cases cited.

The first shipment could and did reach Spokane late during the night of November 23d. The second was not made from Hutchinson until November 20th at 6 p. m., too late, according to respondent's testimony, to reach Spokane prior to November 24th. Respondent thus failed to comply with a material stipulation of his contract in that he failed to make prompt shipments, and unless appellant has waived this breach, respondent cannot recover. We are unable to

find any such waiver. Although appellant insisted the turkeys were of inferior quality, there was no evidence that it assigned that fact as its exclusive reason for rejecting them. Appellant inspected the first shipment on Sunday morning after its arrival in Spokane, and immediately rejected it. At that time appellant did not waive, or show any intention to waive, any other breach of the contract. The only theory upon which any waiver can be claimed is kindred to that of estoppel.

"The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. . . . Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred; especially where such silence is unaccompanied by any act calculated to mislead." 40 Cyc. 261, 263.

No facts constituting an estoppel or disclosing an intentional waiver by appellant are shown in this action. Appellant examined the first shipment and immediately rejected it, without assigning any special reason. The second shipment was not examined. There is no evidence that appellant at any time advised respondent, or that respondent knew, the shipment was rejected because of inferior quality. Appellant was entitled to have the entire order shipped from Hutchinson in time to arrive in Spokane not later than November 23d during business hours. The greater portion of it was shipped too late for arrival within that time. The fact that respondent did not have all the stock on hand when the order was made and that he had to purchase some of it does not excuse him. He should not have contracted if he could not deliver within the stipulated time. He testified that, on November 24th or 25th, he received a telegram from the express agent at Spokane advising him that the shipment had

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been rejected, but he failed to state that any reason appellant may have assigned was communicated to him. He further testified, that he ordered the express company to place the turkeys in storage; that after the agent informed him this had been done, he let the matter rest until February, 1908, when he made a trip to Spokane and endeavored but failed to effect a settlement; that he then asked appellant why the shipment had been refused, but that it had no particular excuse to offer. The record fails to show that any specific reason for rejecting the shipments was communicated to respondent by appellant or through any other person. No act of appellant has been shown constituting a waiver of any sufficient reason it had for rejecting the shipment, or which will estop it from asserting the defense of late shipment.

Appellant's challenge to the sufficiency of the evidence should have been sustained. The judgment is reversed, and the cause remanded with instructions to dismiss.

GOSE, PARKER, and CHADWICK, JJ., concur.

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[No. 10049. Department One. August 14, 1912.]

OLE LENNON *et al.*, *Respondents*, v. THE CITY OF SEATTLE,  
*Appellant*.<sup>1</sup>

MUNICIPAL CORPORATIONS — SEWERS — DEFECTIVE CONSTRUCTION — NEGLIGENCE — EVIDENCE — SUFFICIENCY. A *prima facie* case of negligence in the construction of a sewer, rendering the city liable for resulting damage to property, is made out, where it appears that an ordinary eight-inch tile sewer pipe 174 feet long with a drop of 90 feet was installed to convey all sewage from an upper fifteen-inch pipe of more than three times the capacity of the smaller pipe, which would subject the pipe to immense pressure in case of stoppage, that on a previous occasion an eight-inch pipe burst in the same location, after which the city put in the eight-inch pipe in question under similar conditions, which again went out in practically the same place carrying earth and a bulkhead with it.

<sup>1</sup>Reported in 125 Pac. 770.

Appeal from a judgment of the superior court for King county, Tallman, J., entered July 31, 1911, in favor of the plaintiffs, after a trial before the court without a jury, in an action for damages to real property. Affirmed.

*James E. Bradford* and *W. F. Van Ruff*, for appellant.

*Leopold M. Stern* (*J. W. Russell*, of counsel), for respondents.

CROW, J.—This action was commenced by Ole Lennon and Sirene Lennon, his wife, against the city of Seattle, to recover damages to real estate. From a judgment in plaintiffs' favor, the defendant has appealed.

Some years since, appellant installed, and has since maintained, a public sewer system, in which a connection extended down a steep gulch from the intersection of East Spruce street and Lakedell avenue to Central avenue. The length of this connection was about one hundred and seventy-four feet, and in that distance it descended or fell about ninety feet. The upper sewer on East Spruce street was constructed with tile sewer pipe fifteen inches in diameter. The lower sewer on Central avenue was constructed of tile sewer pipe about twelve inches in diameter, and the connecting sewer line from East Spruce street to Central avenue was constructed with tile sewer pipe eight inches in diameter. About 1906, a like connection from East Spruce street to Central avenue ran down the same gulch on a slightly different line. At that time it broke and damaged real estate of one Mrs. Getto. She filed a claim for damages, which was adjusted by the city purchasing her lots located on Lakedell avenue near the upper portion of the gulch and East Spruce street. Thereafter the city slightly changed the course of the connecting sewer by constructing a new line with eight-inch tile sewer pipe through the Getto lots. It also constructed on the rear of the lots and above the sewer a large bulkhead of logs to retain earth with which it filled and graded the lots.

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Respondents own two lots below the Getto lots, near the point where the connecting line entered the lower sewer on Central avenue. There was no evidence that respondents' lots were connected with, or in any manner benefited by, the sewer system. Their lots, which were improved with a residence, an outbuilding, a fence, and numerous fruit trees, were much lower at the rear toward the gulch and sewer than at the front. Shortly prior to, or about January, 1910, the appellant city graded Lakedell avenue and removed earth therefrom, which it deposited on the Getto lots above, over, and across the bulkhead. Shortly thereafter the bulkhead gave away, and the eight-inch connecting sewer pipe broke, with the result that the bulkhead, earth, and sewage were precipitated down, upon, and across the rear of respondents' lots, carrying away and destroying their fence, outbuilding and fruit trees. To recover the resulting damages, this action was instituted.

The above facts were shown by undisputed evidence. Respondents introduced further evidence to show that the eight-inch sewer was installed to convey all sewage from the upper fifteen-inch pipe on East Spruce street to the twelve-inch pipe in Central avenue; that the eight-inch pipe was one hundred and seventy-four feet long, dropped ninety feet, and was installed by the city on land owned by it; that it passed under or through the log bulkhead; that the capacity of the fifteen-inch pipe was about three and one-fourth times that of the eight-inch pipe; that in the event of the lower pipe becoming clogged, the pressure of water from above on the inside of the eight-inch pipe would be about forty pounds to the square inch, and that the eight-inch pipe, which would have to withstand this enormous pressure, was only an ordinary tile sewer pipe. Upon this evidence respondents make a calculation showing that, in the event of the eight-inch pipe becoming clogged or stopped at its lowest point, where it connected with the Central avenue sewer, it would be subjected

to an enormous and excessive pressure which would gradually decrease from that point to its upper portion at East Spruce street. After these facts had been shown and respondents had proven their damages, appellant introduced evidence as to the extent of the damages, and rested without offering any evidence as to the construction of the sewer, the method of its maintenance, or the cause of the break.

Appellant contends that its challenge to the sufficiency of the evidence should have been sustained; that the respondents have shown no negligence on its part; that the doctrine of *res ipsa loquitur* cannot be applied to a case of this character; that no previous notice to appellant of any defect or obstruction in the sewer has been shown; and that the proof of the mere happening of the break is insufficient to sustain a recovery. Acts of municipal officers in adopting drainage plans and in determining when and where sewers are to be constructed are recognized as *quasi* judicial, as they involve an exercise of deliberate judgment and discretion. It has frequently been held that, in exercising such judgment and discretion or in adopting sewer systems and plans, municipalities will incur no liability for such acts, as it will ordinarily be presumed, in the absence of any showing of actual negligence, that reasonable care has been used. While the elementary rule is as stated, we do not think it should prevent a recovery on the facts before us. It has been shown that on a previous occasion an eight-inch connection went out in substantially the same location, causing damage to the Getto lots; yet the city constructed another eight-inch tile connection in practically the same location, under similar conditions, built the bulkhead which it covered with earth, and that the sewer again went out in practically the same place, carrying the bulkhead and earth with it.

These facts, coupled with the certainty of an immense pressure on the eight-inch tile in the event of a stoppage, made at least a *prima facie* case of notice to the city, and negli-



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gence as against the city. Appellant made no effort to disclose the true cause of the break, or to show that it was without negligence. It was in a better position to understand the situation and to explain the true cause of the accident than were respondents. Without any attempt to do so, it now argues that respondents have proven no negligence, and should be precluded from recovery. This position cannot be sustained. Respondents' rights have been invaded. Their property has been destroyed without fault or negligence on their part. The destruction was caused by an agency under the absolute dominion and control of the city. Sewage, earth, and debris have been precipitated upon respondents' property, and thereby they have been injured.

In *Ashley v. Port Huron*, 35 Mich. 296, 24 Am. Rep. 552, a well-considered case, in which damage to private property was occasioned by a sewer, Judge Cooley, after citing and discussing numerous decisions, well said:

"It is very manifest from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort; but it is no more liable under such circumstances than it is when it pours upon his land a flood of water by a public sewer so constructed that the flooding must be a necessary result. The one is no more unjustifiable, and no more an actionable wrong, than the other. Each is a trespass, and in each instance the city exceeds its lawful jurisdiction. A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it is done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other."

In *Roberts v. Dover*, 72 N. H. 147, 153, 55 Atl. 895, a sewer case, the court, discussing the duties and liability of a municipal corporation, said:

"In *Rowe v. Portsmouth*, 56 N. H. 291, it was held that in maintaining a public sewer a city is bound to use that degree of care and prudence which a discreet and cautious individual would use if the whole loss or risk was to be his alone. The case renders unnecessary a discussion of the liability of a city or town, which builds a sewer under legislative authority, for defects in the plan adopted. When, having constructed a sewer, it connects it with other sewers and drains, overtaxing its capacity, and allows insoluble materials to accumulate in it and obstruct the flow of the water, causing it to flow back upon private property, its liability for the resulting damage does not differ from that of an individual, who so unreasonably manages his property as to cause damage to the adjoining property of his neighbor. The fact that it is a public corporation, performing certain public duties, does not exempt it from liability for negligence when performing a work not imposed upon it as a public agent, but voluntarily assumed by it under a legislative license. Having undertaken the construction and management of a system of sewerage for the local accommodation and convenience, its duties to individuals liable to be damaged thereby is measured by the same rule of ordinary care and prudence under the circumstances as would be applied if it were a private business corporation, partnership, or individual engaged in the same work."

The appellant has made no attempt to show the cause of the break which damaged respondents, but asserts its exemption from liability on the ground that no negligence has been shown on its part in the adoption of the original system and plan which it installed. If the system had been properly adopted and afterwards maintained, it would seem that, in the ordinary course of events, it would not have damaged respondents in the manner here shown. We therefore conclude that the *prima facie* case of notice and negligence which respondents have made imposed upon appellant the duty of introducing at least sufficient proof to meet the same. In

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*King v. Kansas City*, 58 Kan. 334, 49 Pac. 88, the court said:

"The city cannot without liability collect sewage and filth and precipitate it upon the property of a citizen, even if the plan is devised in good faith and the best material is used in the construction. It is immaterial from which end of the sewer the discharge is made; the consequence and liability are necessarily the same. 'Courts of the highest respectability have held that if the sewer, *whatever its plan*, is so constructed by the municipal authorities as to *cause a positive and direct invasion* of the plaintiff's private property, as by collecting and throwing upon it to his damage water or sewage which would not otherwise have flowed or found its way there, the corporation is liable.' 2 Dillon, *Municipal Corporations* (4th ed.), § 1047. See, also, *Ashley v. Port Huron*, 35 Mich. 296; *Tate v. St. Paul*, 56 Minn. 527; *Seifert v. City of Brooklyn*, 101 N. Y. 136; *Tehn v. San Francisco*, 66 Cal. 76; *North Vernon v. Vogler*, 89 Ind. 77; *Orange v. Field*, 37 N. J. Eq. 600."

The views here expressed are in harmony with the holding of this court in *Hayes v. Vancouver*, 61 Wash. 536, 112 Pac. 498, where we quoted from *Ashley v. Port Huron*, *supra*, the identical excerpt above quoted, and said:

"The decisions of the courts relating to damage caused by cities in maintaining sewers and drains, especially where the damage is the result of a positive direct act of the city, seem to be quite uniform in holding that the city is liable for such damage, and that it cannot escape upon the plea that it was the result of the performing of a purely governmental act."

A *prima facie* case of negligence sufficient to sustain the judgment was made by the respondents which, in the absence of any showing by the appellant, should be sustained. The judgment is affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

[No. 10216. Department One. August 14, 1912.]

HILLIS LOGGING COMPANY, *Appellant*, v. C. T. MESCHER,  
*Respondent*.<sup>1</sup>

PRINCIPAL AND AGENT—PERSONAL LIABILITY OF AGENT—BREACH OF COVENANTS—SALES—TITLE—MISREPRESENTATIONS. The covenants of warranty of title in a bill of sale signed by the defendant as agent do not render him liable for misrepresenting the title, which failed, where he had authority to make the sale and believed that his principal had good title, and made no representations relating to the title other than those contained in the bill of sale, which were the covenants of the principal.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 25, 1911, upon the verdict of a jury rendered in favor of the defendant by direction of the court, in an action for fraud. Affirmed.

*Merrick & Mills*, for appellant.

*J. Henry Denning*, for respondent.

PARKER, J.—The plaintiff commenced this action in the superior court to recover damages resulting to it from alleged false and fraudulent representations made by the defendant inducing it to purchase from the Betz Mescher Company, a corporation, a second-hand donkey engine. The cause was tried before the court and a jury. At the close of the evidence, the court directed a verdict in favor of the defendant, which the jury returned. Judgment was rendered accordingly. The plaintiff has appealed.

The controlling facts are not in dispute. Appellant purchased the engine from the Betz Mescher Company through respondent as agent of that company, at an agreed price of \$600. The purchase price was paid by appellant to respondent, and by him turned over to the Betz Mescher Company. Thereafter appellant lost the engine because of the

<sup>1</sup>Reported in 125 Pac. 768.

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defective title of the Betz Mescher Company thereto at the time of the sale. The alleged false representations made by respondent to appellant inducing the sale were that the Betz Mescher Company had good title to the engine and right to convey the same. It is undisputed however that no representations whatever were made by respondent to appellant relating to the title orally, in the negotiations leading up to the sale. The only representations made as to title were those of the usual covenants of warranty of title which were contained in the bill of sale executed for the conveyance of the engine. This was a bill of sale executed by Betz Mescher Co. by C. T. Mescher.

There is but little evidence tending to show what knowledge respondent had of the title to the engine, but what little there is tends to show that he honestly believed that the Betz Mescher Company had, at the time of the sale, perfect title to the engine and a right to sell it. Respondent was apparently fully authorized to make the sale for the Betz Mescher Company so far as his agency authority is concerned, and no contention is made to the contrary. The facts indicate that appellant may have a good cause of action against the Betz Mescher Company upon its warranty, but it seems clear to us that sufficient has not been shown to support a charge of fraudulent representation against respondent. He is not shown to have made any representations personally. In so far as the language of the covenants of warranty is concerned, it is the language of the Betz Mescher Company. That language having been used by it through respondent as its agent, might render him responsible therefor if known by him to be false, but not otherwise. 20 Cyc. 24.

The judgment is affirmed.

MOUNT, GOSE, CROW, and CHADWICK, JJ., concur.

[No. 10410. Department One. August 14, 1912.]

**ELEANOR HERRICK *et al.*, Appellants, v. EVA J. MILLER *et al.*,  
Respondents.<sup>1</sup>**

**WILLS—CONSTRUCTION—INTENT—COMMUNITY PROPERTY—ELECTION BY WIDOW—PROPERTY DEVISED—PRESUMPTION.** A will devising all of the testator's real estate, "and all interest therein, community or otherwise" of which he dies seized or to which he shall have the power of disposition by will, in trust to pay the net income to his wife during life or widowhood, does not show any intent to devise the wife's half of the community property, and hence does not put her to an election between her community interest and the provision made for her in the will; in view of the rule that the necessity for an election must appear upon the face of the will itself, and the presumption that the testator intended to dispose of his own property only, in the absence of any designation of specific property (CHADWICK, J., dissenting).

**WILLS—CONSTRUCTION—EXTRINSIC EVIDENCE—ELECTION.** For the purpose of forcing an election, extrinsic evidence is not admissible to establish the intent to dispose of property over which the testator had no testamentary power of disposition.

**WILLS—ELECTION—EVIDENCE—MATERIALITY.** Where a widow was not required by a will to make an election between her community interest and the provision made for her in the will, it is immaterial whether her acts in dealing with the estate would have amounted to an election if the will had required it.

**FRAUDS, STATUTE OF—CONVEYANCE OF COMMUNITY PROPERTY—ORAL AGREEMENT.** An oral agreement by a widow to allow her community interest in real estate to go under her husband's will cannot be shown to divest her of her community interest, the statute requiring such conveyance to be by deed.

**APPEAL—REVIEW—PARTIES ENTITLED TO ALLEGE ERROR.** One seeking, by an alternative prayer in the complaint, a partition of interests in a will contest, cannot allege error in the separation of interests in that the will contemplated the management of the property as a whole.

Appeal from a judgment of the superior court for King county, Myers, J., entered January 2, 1912, upon findings in favor of the defendants, after a trial on the merits before

<sup>1</sup>Reported in 125 Pac. 974.

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the court without a jury, in an action to obtain the construction of a will. Affirmed.

*Tucker & Hyland*, for appellants.

*Bo Sweeney*, for respondents.

PARKER, J.—The parties to this action are the children and widow of Dr. P. B. M. Miller, deceased, late of Seattle. The purpose of the action is to obtain a construction of his will and a settlement of all of the property rights of the parties under the will. Dr. Miller died on December 3, 1904, leaving the will here involved, which he had made a few months previous. The only provisions of the will which we need notice in our present inquiry are the following:

“(3) I bequeath to my son, Hubert Livingston Miller, my gold watch and chain, all my medical library, surgical instruments and general surgical equipment of every nature whatsoever.

“(4) I bequeath all the residue of my personal property and effects of every nature whatever, including my separate personal property and my interest in community personal property wheresoever situated, after the payment of my debts, funeral and testamentary expenses as hereinbefore provided, unto my wife, Eva J. Miller, absolutely.

“(5) I give and devise all my real estate of every tenure whatsoever and wheresoever situated, and all interests therein, community and otherwise, of which I shall at my death be seized or entitled to, or of which I shall at my death have power to dispose of by will, unto my wife, Eva J. Miller, and my son, George E. Miller, my executors hereinafter named, and to the survivor of them, and their successors, in trust, to be held by them for the purposes and subject to the provisions hereinafter declared.

“(6) I declare it to be my earnest request and recommendation that, under no circumstances, shall any part of my real property be sold during the lifetime of my said wife, provided, she shall so long continue my widow; but that said property shall be rented and leased as may seem best to my executors and trustees and their successors; and I direct that the net income therefrom shall be paid to my said wife dur-

ing her widowhood and become her absolute property and she shall not be liable to account for any income so paid to or received by her.

“(7) I direct that, after the death or future marriage of my said wife, her successor in the trust and the said George E. Miller or his successor in the trust shall, as soon as practicable thereafter, sell all of my real estate and interests therein hereinbefore devised in trust and convert the same into money, and shall for the purposes aforesaid execute and deliver all such deeds and conveyances as may be necessary to pass the proper title thereto:—and I direct that the money so received from such sale or sales, together with the income received from said real property from and after the death or re-marriage of my said wife, shall be distributed equally, share and share alike, among my children, . . .”

The will appoints Eva J. Miller and George E. Miller, widow and son of the testator, executrix and executor without bonds, and directs the settlement and management of the estate without the intervention of the court, except to admit the will to probate and file an inventory as required by law. Accordingly, in January, 1905, the will was admitted to probate, and an inventory filed by the executor and executrix. All of the property left by Dr. Miller was his interest in the community property of himself and wife, Eva J. Miller. That community property consisted of lot 1 and the north 15 feet of lot 4 in block 48, Terry's addition to Seattle, which was appraised at \$35,000, and personal property consisting of surgical instruments, medical library, office furniture, and household furniture which was appraised at \$850. The community real property above described, at the time of the death of Dr. Miller, consisted of a tract of land fronting 75 feet upon the east side of Sixth avenue and 120 feet upon the south side of Marion street, being at the southeast corner of the intersection of that avenue and street in Seattle, together with a hotel building situated upon the westerly portion of the tract, and also a foundation situated upon the easterly portion of the tract upon which they were then contemplating the erection of another building. This property



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is referred to as the "Ross-shire," that being the name they gave to the hotel building thereon. The management of this property appears to have been left largely if not wholly to Mrs. Miller after the death of Dr. Miller. She had separate funds of her own with which she thereafter erected upon the foundation on the easterly portion of the tract a building at a cost of approximately \$12,000. This building and the other one upon the westerly portion of the tract were rented together as a hotel. In May, 1911, in a condemnation proceeding prosecuted by the city of Seattle to acquire the right to damage the Ross-shire property by changing the grade of Sixth avenue, there was awarded to the owners of that property the sum of \$12,000 damages, which was accordingly paid into court by the city. The claim of Mrs. Miller to one-half of this money as belonging to her absolutely, and that only one-half thereof belonged to the trust estate, gave rise to this controversy, and resulted in the bringing of this action in June, 1911, by certain of the residuary devisees to settle the property rights of all parties under the will.

The substance of the prayer of plaintiffs' complaint is that the will be so construed as to give to Mrs. Miller only the net income from the Ross-shire property and the \$12,000 awarded as damages to that property in the condemnation case, reserving the whole thereof to go to the residuary devisees upon the death or remarriage of Mrs. Miller. The theory of this claim of the plaintiffs is that Dr. Miller devised the whole of the Ross-shire property as if it were his separate property; that Mrs. Miller was thereby required to elect between her right to her community interest in that property and her right to the income from the whole thereof under the will, and that she has elected to take under the will and thereby waived her right to assert her community interest. The plaintiffs also prayed in the alternative that in the event the court should decree that they are not entitled to the construction of the will claimed by them, the respective interests of Mrs. Miller and the residuary devisees be finally

determined, and that the community interest of Mrs. Miller, if she be decreed to have any such interest, be set apart to her.

The trial court decreed, in substance, that the plaintiffs were not entitled to the construction of the will claimed by them; that Mrs. Miller was not required to elect between her community interest and her rights under the terms of the will; that she is the absolute owner, by virtue of her community right, of an undivided one-half interest in the Ross-shire property, exclusive of the building she erected thereon with her separate funds, and that she is the owner of that building. The court also partitioned the Ross-shire property, with the aid of commissioners appointed for that purpose, between Mrs. Miller and the trust estate, awarding to her the easterly seventy feet on which her building is situated, and to the trust estate the westerly fifty feet together with the building thereon. The court also awarded the \$12,000, one-half to Mrs. Miller and one-half to the trust estate, providing, however, that there should be first paid therefrom a mortgage upon the Ross-shire property for \$3,600, which had been given to raise funds to pay a community debt incurred by Dr. Miller in his lifetime. From this determination of the rights of the parties, the plaintiffs have appealed.

The controlling question in this case is, Was Mrs. Miller required to elect between her community interest in the Ross-shire property and her right to the net income from the whole thereof, which it is claimed by counsel for appellants was devised to her by the terms of the will? In other words, is the devise made to her by the will so inconsistent with her claim of community interest in the property that equity will not permit her to assert both claims? Learned counsel for appellants contend that such rights of Mrs. Miller are so inconsistent that she cannot successfully maintain both, but must choose which one she will exercise, and abandon the other. This contention is rested upon the general rule that when the owner of an estate, in an instrument of donation,

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either will or deed, uses language with reference to the property of another, which, if that property were his own, would amount to an effectual disposition of it to a third person, and by the same instrument gives a portion of his own estate to that same owner whose rights of ownership he had thus assumed to transfer, such owner and donee is put to an election between his claim of title to the property so assumed to be disposed of by the donor, and his right as donee under the instrument.

Before looking to the particular language of the will, let us notice some of the rules of law applicable to the construction of such instruments when a question of election is involved. In 1 Pomeroy, Equity Jurisprudence (3d ed.), at § 472, that learned author says:

“The first and fundamental rule, of which all the others are little more than corollaries, is: In order to create the necessity for an election, there must appear upon the face of the will itself, or of the other instrument of donation, a clear, unmistakable intention, on the part of the testator or other donor, to dispose of property which is in fact not his own. This intention to dispose of property which in fact belongs to another, and is not within the donor’s power of disposition, must appear from language of the instrument which is unequivocal, which leaves no doubt as to the donor’s design; the necessity of an election can never exist from an uncertain or dubious interpretation of the clause of donation. It is the settled rule that no case for an election arises unless the gift to one beneficiary is irreconcilable with an estate, interest, or right which another donee is called upon to relinquish; if both gifts can, upon any interpretation of which the language is reasonably susceptible, stand together, then an election is unnecessary.”

A strong presumption, necessary to overcome in order to require an election on the part of the donee under such circumstances, is that the testator is presumed to intend only to dispose of property over which he has testamentary power of disposition. The authorities hereafter noticed show that this presumption will always prevail unless the testator’s in-

tention is clearly expressed or necessarily implied to the contrary by the terms of the will itself. We think there is no dissent from this rule. We will also find as we proceed that such an intention on the part of the testator must be evidenced by designating with certainty the specific property he so assumes to dispose of, in order to put his donee to an election. The simplest case requiring an election is where a testator assumes to dispose of property of his devisee and designates the property he so assumes to dispose of by description such as would be sufficient in an ordinary conveyance. In such a case it is easy to see that the devisee is put to an election, because there is then no uncertainty as to the testator's intention to dispose of property belonging to his devisee. In this case, however, we have no such specific designation of the property of the devisee which it is claimed the testator assumed to dispose of as his own, and besides we are dealing with property which belonged equally to both the testator and the devisee. Such cases give rise to more difficulty in the determination of a question of election. The Ross-shire property being the community property of Dr. and Mrs. Miller, under our laws he had no power of disposition of that property by conveyance during his lifetime, except by deed joined in by Mrs. Miller (Rem. & Bal. Code, § 5918); nor did he possess any testamentary power of disposition thereof except as to his community interest therein alone, that being only an undivided one-half interest. Rem. & Bal. Code, § 1342. If we assume that this is simply a case of two persons owning undivided interests in property, apart from the analogy sometimes sought to be drawn by the courts between dower and community property rights of a wife, we find the following observations of Professor Pomeroy applicable here:

“If a testator owning an undivided share uses language of description and donation which may apply to and include the whole property, and by the same will gives benefits to his co-owner, the question arises whether such co-owner is bound

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to elect between the benefits conferred by the will and his own share of the property. *Prima facie* a testator is presumed to have intended to bequeath that alone which he owned,—that only over which his power of disposal extended. Whenever, therefore, the testator does not give the whole property *specifically*, but employs *general words* of description and donation, such as ‘all my lands,’ and the like, it is well settled that no case for an election arises, because there is an interest belonging to the testator to which the disposing language can apply, and the *prima facie* presumption as to his intent will control. On the other hand, if the testator devises the property *specifically* by language indicating a specific gift of the property, an election becomes necessary.” 1 Pomeroy, Equity Jurisprudence (3d ed.), § 489.

If we assume that dower and community property rights of a wife are analogous rights, then it would seem that there must be an equally clear expression of an intention on the part of the husband in his will to put her to an election, because a gift to a wife by will, in jurisdictions where dower rights exist, in the absence of statute prescribing a different rule, is presumed to be intended as a provision in addition to her dower right, unless the language of the will clearly expresses or necessarily implies that such gift to her is in lieu of dower. 1 Pomeroy, Equity Jurisprudence (3d ed.), § 493. At § 505, referring to the question of election by a wife between community rights and her rights under the will of her husband, the author further observed:

“Whenever a husband has made some testamentary provision for his wife, and has also assumed to dispose of more than his own half of the community property, in order that she shall be put to her election, the testamentary provision in her behalf must either be declared in express terms to be given to her in lieu of her own proprietary right and interest in the community property, or else an intention on his part that it shall be in lieu of such proprietary right must be deduced by clear and manifest implication from the will, founded upon the fact that the claim to her share of the community property would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them.

An intent of the husband to dispose of his wife's share of the community property by his will, and thus to put her to an election, will not be readily inferred, and will never be inferred where the words of the gift may have their fair and natural import by applying them only to the one-half of the community property which he has the power to dispose of by will."

Having in mind these rules of construction, what does the language of this will tell us as to the intention of Dr. Miller to dispose of his wife's interest in their community property?

The only language of the will which can possibly be construed as expressing an intention on the part of Dr. Miller to dispose of Mrs. Miller's community interest in the Ross-shire property is the following: "I give and devise all my real estate of every tenure whatsoever and wheresoever situated, and all interest therein, community and otherwise, of which I shall at my death be seized or entitled to, or to which I shall at my death have power to dispose of by will, unto my wife Eva J. Miller and my son George E. Miller . . . in trust," etc.; Mrs. Miller being the sole beneficiary of that trust during her life or until she again marries. No specific property is designated or described in any manner, and the language apparently expressly limits his testamentary disposition to property which he shall at the time of his death "*be seized or entitled to*" or "*have power to dispose of by will.*" In view of the fact that he is not seized of or entitled to the wife's community property, has no power of disposition thereof during her lifetime, nor any power of testamentary disposition thereof, it seems to us that there is but little room for arguing that this language is even ambiguous as to whose property he assumed to dispose of. Standing alone and applying thereto the rules of construction we have noticed, it seems to us that the language does not express an intention on the part of Dr. Miller to dispose of his wife's community interest. In any event such an intent is not expressed with such clearness as the law requires in order to put her to an election. In the case of *Estate of Gilmore*, 81

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Cal. 240, 22 Pac. 655, dealing with the provisions of a will disposing of property in language no more specific than this, the court said:

"It will be observed that the will does not specifically describe any property, but simply gives to the wife 'one-half of all my property, both real and personal, of which I shall be possessed at the time of my death.'

"Conceding that the will is susceptible of two possible constructions,—one, that the testator intended to devise all property of which he should be possessed at the last moment of life, including the whole of the community property over which he had the power of disposition during life; and the other, that he intended to devise only his property then in his possession, over which alone he had the power of *testamentary* disposition,—still, well-settled rules of construction and presumptions of law require the adoption of the latter construction, which accords with the decree of the lower court.

"(1) The testator must be presumed to have known the law applicable to the disposition of property by will, and therefore to have known that he had no power to dispose, by will, of his wife's interest in the community property, but only of his own interest therein. (Civ. Code, §§ 172, 1331, 1402; *Morrison v. Bowman*, 29 Cal. 347; *Estate of Frey*, 52 Cal. 660.)

"(2) He must also be presumed not to have intended to devise any property over which he had no power of testamentary disposition, and therefore the will should be read as applying only to his property within such power. (*King v. Lagrange*, 50 Cal. 332; *Estate of Silvey*, 42 Cal. 212.) In the latter case it was said: 'The devise must be read as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property which by statute would pass to the wife, as survivor of the matrimonial community upon his death, is not to be readily inferred especially where, as here, the words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition.'

"The devise in this case is, 'of all my property of which I may die possessed,' and not of any specific property. The devise to the wife is not inconsistent with the other devises to



the daughter and grandchildren. All the 'words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition'; and there is nothing in the circumstances under which the will was made substantially tending to rebut the presumptions above stated. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome those presumptions that the wife can be put to her election either to take under the will, or to take what she is entitled to by law. (*Morrison v. Bowman*, 29 Cal. 347; *Noe v. Splivalo*, 54 Cal. 207; *Estate of Stewart*, 74 Cal. 98.) But where there is no such manifest intent, the wife may claim and take both what the law gives her in the community property, and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. (*Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Payne v. Payne*, 18 Cal. 301; *Estate of Silvey*, 44 Cal. 210; *King v. Lagrange*, 50 Cal. 331; *Estate of Frey*, 52 Cal. 658.)"

In the case of *In re Wickersham's Estate*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437, the court held that a similar provision of a husband's will did not require the wife to elect between her community rights and her rights under the will, and further that, notwithstanding she there expressly elected, by a signed written instrument under the belief that she was required to elect, the written instrument of election not being intended as a conveyance to the other legatees, such election amounted to nothing as affecting her rights, and that she thereafter could claim both under the will and her half of the community property. These California cases are of special interest and force in this case, in view of the fact that, under the laws of California, the husband has the absolute power of disposition of the community property by deed without the wife joining therein, during his lifetime. We have seen that he has no such power under the laws of the state of Washington. In the earlier California case of *Estate of Stewart*, 74 Cal. 98, 15 Pac. 445, the court was evidently largely influenced by the fact that the husband had power to dispose of



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the whole of the community property during his lifetime, as indicated by its remarks at page 103 as follows:

“When read together, the provisions of the will are the best expression—short of a direct statement to that effect—that he was dealing with the whole of the community property under the phrase ‘all my estate.’ Every clause in the will bears a clear and indisputable badge of that intention. He dealt with the property just as he had been accustomed to deal with it through a long, active, and successful business life; just as he had in accumulating and disposing of the property during his lifetime,—without consulting his wife, or asking her to join with him in any conveyance. He uses the phrase ‘my estate’ in the sense that he had been accustomed to use it all his life. It *was* his estate. He could dispose of it absolutely without the consent of his wife during his life, and he thought undoubtedly that he could do so, and that he was doing so, by his will.”

The result of that case seems to be not in entire harmony with the later California cases we have above noticed; but it is worthy of note that the case was decided by a majority of one only, three of the judges dissenting. We are of the opinion that Mrs. Miller was not required to elect between her community rights and her right to take under the provisions of the will. This view finds support in *Moss v. Hellsley*, 60 Tex. 426; *Pratt v. Douglas*, 38 N. J. Eq. 516; *In re Gwin's Estate*, 77 Cal. 313, 19 Pac. 527.

It is contended that the trial court erred in excluding oral evidence offered to show a conversation had between Mrs. Miller, the son George E. Miller, one of the appellants, and Dr. Miller prior to his death. The purpose of this evidence was to show the intention of Dr. Miller to dispose of all of the community property, including Mrs. Miller's portion, by the terms of his will, and was offered upon the assumption that the language of the will was so ambiguous as to warrant the introduction of such evidence in explanation of its meaning. The authorities seem practically harmonious in holding that for the purpose of forcing an election, extrinsic evidence is not admissible to establish the intention of the testa-

tor to dispose of property over which he has no testamentary power of disposition. This is apparently the rule, even though the language of the will is ambiguous, whatever may be the rule as to the admissibility of evidence to explain its ambiguity in other respects. The strength of the presumption against an intention of a testator to dispose of property which is not his own is so strong that the law will not permit any such intention to be shown by oral evidence, but such intention must appear from the language of the will alone. In *Miller v. Springer*, 70 Pa. St. 269, Justice Sharswood, speaking for the court, said:

“The will of Rachel Skiles, on its face, raised no case of election. It did not assume to devise the property in question as her own, although her title to it, if she had any, certainly did pass by general words. It is well settled, and accords with the reason and principle of the thing, that if the language of the will admit of being restricted to property belonging to or disposable by the testator, the inference will be that he did not intend them to apply to that over which he had no disposing power. A general devise of the testator’s real estate has always been held to show an intention to give what strictly belongs to him, and nothing more, even if the testator had no real estate of his own upon which the devise could otherwise operate: 1 Jarman on Wills 393. Nor can evidence *dehors* the will be admitted to show that the testator considered the land in question to belong to him, and intended it to pass under the will.”

Equally strong expression of the rule is found in *Jones v. Jones*, 33 Md. 155, in the language of Justice Frick as follows:

“The intention to raise an election must be clear and manifest from the will itself. That intention must be collected from the face of the instrument, and without a clear and express manifestation, it cannot be presumed to extend to property which did not otherwise pass under it. If the will is susceptible of a construction that does not require it, then, by reason of its imperfect execution here, it is not a case where the party can be put to his election as to the property in this state.”

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Probably as clear and comprehensive a statement of the doctrine as can be found is that made by Justice Mitchell in *Sherman v. Lewis*, 44 Minn. 107, 46 N. W. 318, as follows:

"The rule is that a general bequest and devise of the testator's property will be construed as intended to extend only to such property as he could dispose of by will. Also, that, even where specific property is disposed of by will, in which the testator had only a partial interest, the courts will, if possible under any reasonable rule of construction, construe the language of the will as intended to apply only to the interest which the testator was able to dispose of; the presumption being that he did not intend it to apply to that over which he had no disposing power. Also that, in order to raise a case for an election, the intention as manifested by the will itself must be clear and decisive. It must be clear, beyond reasonable doubt, that the testator has intentionally assumed to dispose of the property of the beneficiary, who is required on that account to give up his own gift. 1 Jarm. Wills (5th ed.) 452-454; 2 Redf. Wills, 745, 746; *Havens v. Sackett*, 15 N. Y. 365; *Washburn v. Van Steenwyk*, 32 Minn. 336, 352 (20 N. W. Rep. 324); *In re Gotzian*, 34 Minn. 159, 164 (24 N. W. Rep. 920). And while parol evidence is admissible, to the same extent as in other cases, in aid of the construction of written instruments,—that is, to show the condition of the subject-matter, and the surrounding circumstances, so far as to place the court in the position of the testator,—yet the intent of the testator to dispose of that which was not his must appear from the words of the will itself, and cannot be proved by evidence *dehors* the instrument."

See, also, *Havens v. Sackett*, 15 N. Y. 365; *Fitzhugh v. Hubbard*, 41 Ark. 64; *Stokes's Estate*, 61 Pa. St. 136; *Charch v. Charch*, 57 Ohio St. 561, 49 N. E. 408; *Young's Adm'r. v. McKinnie's Adm'r*, 5 Fla. 542; *McDonald v. Shaw*, 92 Ark. 15, 121 S. W. 935. See note to this case in 28 L. R. A. (N. S.) 657.

Our own decisions in *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643, 72 Pac. 502, and *Rathjens v. Merrill*, 38 Wash. 442, 80 Pac. 754, are not in conflict with this view. Those were not election cases. Nor do we think our

decision in *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255, holds differently, in view of the circumstances there involved. That was a case of mutual wills which amounted to a settlement of a contractual nature.

A considerable portion of the argument of learned counsel for appellants deals with the acts of Mrs. Miller in the management of the trust estate, which it is claimed amounted to an election on her part to claim under the will. Since we have concluded that she was not required to elect by the terms of the will, we regard it as immaterial as to whether or not such acts would have amounted to an election. *In re Gwin's Estate*, 77 Cal. 313, 19 Pac. 527; *In re Wickersham's Estate*, 138 Cal. 355, 70 Pac. 1076, 71 Pac. 437. Her acts in no event amounted to a conveyance of her community rights to the residuary devisees, nor did her acts mislead or cause the residuary legatees to act to their prejudice so as to raise an estoppel against Mrs. Miller claiming her community interest.

Counsel for appellants also rely to a considerable extent upon evidence which they claim tends to show an agreement and understanding between Mrs. Miller and the residuary devisees to the effect that she would keep all of the property together and let it all go to them at her death as if she were required to and had elected under the will. It is not only argued that the evidence admitted shows such an agreement, but also that the trial court erroneously excluded other evidence offered to that end. In any event we have nothing to support such a contention but oral evidence, either received by the court or offered and rejected by the court. To say that Mrs. Miller's community property could be lost to her by any such oral understanding would be equal to saying that she could convey her real property in that manner. Manifestly she cannot be divested of her community real property by mere word of mouth alone, however certain such an intention may have been expressed by her in that manner.

So far we have dealt with the language of the will as

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though it contained nothing but the language of the devise made to the executor and executrix in trust for Mrs. Miller's benefit. There are other provisions in the will relating to the management of the property devised in trust, as will be noticed by reference to the provisions of the will above quoted, which may seem to indicate an intention that all of the Ross-shire property should be kept and managed together. Those provisions, however, even if construed as mandatory, go only to the question of the management of the property, and do not affect the question of where the title thereto shall ultimately rest. Manifestly no one is interested in this question except Mrs. Miller and the residuary devisees. It is true that all of the Ross-shire property will not necessarily be managed together if Mrs. Miller's portion be partitioned to her, though it may be so managed if she and her co-executor so desire, since she in any event is entitled to the entire net income therefrom. But these appellants are not in position to complain of a separation of these interests. They have in effect asked that very thing by the alternative prayer of their complaint. Whether or not Mrs. Miller would have the right to have the property partitioned and her interest set apart against the objections of the residuary devisees and thus give her the power to prevent the joint management, which it may be argued the will contemplates, is now of but little consequence in view of the manner in which the several rights of the parties are sought by appellants to be settled in this action. This is only a question of whether or not partition shall take place now between Mrs. Miller and the trust estate, or shall take place at her death or marriage. Appellants seeking this partition cannot complain that it seems in a measure to defeat the management of the trust estate as contemplated by the will.

Some contention is made upon the claimed necessity of Mrs. Miller accounting for rents and profits of the property during her management of the trust estate. This becomes of no consequence in view of the fact that in any event she is en-

titled to all of the net income, not only of her own community interest, but also of the trust estate during her life or until she marries. She has not wasted the property nor caused its depreciation in value in the least. Manifestly she has nothing to account for.

The partition of the property as made is apparently eminently just and fair, and the fact that it could be, and was, so partitioned as to give to her her own building without impairing the rights of the residuary legatees in the least, renders the question of their rights in that building, by reason of it having been built upon the common property by her, of no consequence. Had the building been placed there by her in such manner that a partition of the property could not have been fairly had by regarding the building as her separate property, Mrs. Miller might have been required to forego her claim of absolute ownership to the building.

We are of the opinion that the learned trial court has properly disposed of the rights of the parties, and that the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., GOSE, and CROW, JJ., concur.

CHADWICK, J. (dissenting).—It is said in the majority opinion that, standing alone and applying thereto the rules of construction theretofore noticed, the language of the will does not express an intention on the part of Dr. Miller to dispose of his wife's community interest; or, if so, it is not expressed with such clearness as the law requires in order to put her to an election. It seems to me that the intent is sufficiently expressed. It is true, as asserted, that the husband cannot, as against the will of his spouse, devise more than his half, but he may so draw his will as to compel an election. There are many things about this will that make his intent sufficiently clear and certain to satisfy the tests of the law. He assumed and undertook to provide that the whole property should be kept intact during the widowhood

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or pending the death of his wife. It is evident from the whole instrument that he intended that the whole property should eventually go to his children, and that, in lieu of her present interest in one-half of the property, his wife would take the income of the whole. When a testator gives property to one whom he would not be bound to recognize as a beneficiary, and the bequest depends upon a beneficial condition, an election must necessarily follow. Mrs. Miller was entitled to her half of the community property; or in lieu thereof, she might take the income of the whole. The effect of the majority holding is that she is entitled to her own and the whole income pending the determination of this litigation. The will states that the property is given in trust to the executors. The trust would be wholly ineffectual unless Mrs. Miller permitted her undivided share to rest in the trust and contented herself with the income of the whole property. While the case of *Prince v. Prince*, 64 Wash. 552, 117 Pac. 255, was based upon the principle of law governing mutual wills, yet it seems to me that the same principle would govern here, inasmuch as Mrs. Miller accepted the terms of the will and acted upon it for a sufficient time to bind her to an election.

For these reasons, I dissent from the majority opinion.

[No. 10003. Department One. August 15, 1912.]

MARY M. BROWN, *Respondent*, v. THE CITY OF BREMERTON,  
*Appellant*.<sup>1</sup>

DEEDS — DESCRIPTION — BOUNDARIES — RESERVATIONS — INTENT — CONSTRUCTION BY PARTIES. A deed of land by metes and bounds including calls "to the harbor limit" and "parallel to said harbor line," which reserves a strip of land thirty feet wide off the north-east corner for a distance of 148.3 feet for the purpose of a public road, must be taken to convey to the inner shore or high water line, and not to the meander line, which was about 100 feet distant where the water was from four to eight feet deep at high water, especially where the strip at high water mark had been used as a roadway for several years prior to the execution of the deed, and was thereafter used by the public continuously as a road for more than ten years prior to the commencement of the action.

DEEDS—CONSTRUCTION—INTENT—EXTRINSIC EVIDENCE. The fact that a common grantor in his last deed reserved a strip of land thirty feet wide along the meander line for a public road, does not show that a like reservation in a deed of a contiguous tract made six years previously of thirty feet "along the shore line" was intended to mean along the meander line.

QUIETING TITLE—TITLE OF PLAINTIFF. In a suit to quiet title, the plaintiff must prevail, if at all, on the strength of her own title.

Appeal from a judgment of the superior court for Kitsap county, Still, J., entered October 20, 1911, in favor of the plaintiff, after a trial on the merits before the court, in an action to quiet title. Reversed.

*F. W. Moore*, for appellant.

*J. W. Bryan*, for respondent.

Gose, J.—This is an action to quiet title. There was a decree for the plaintiff. The city has appealed.

In August, 1900, Warren Smith and his wife conveyed to the respondent a tract of land by metes and bounds, contain-

<sup>1</sup>Reported in 125 Pac. 785.



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ing 3.60 acres. The deed contained the following reservation clause:

“Reserving and excepting a strip of land thirty (30) feet in width off of and along the northeast corner of said above described tract of land for a distance of one hundred and forty-eight and three-tenths (148.3) feet; said reserved strip of land along the shore line of the above described tract of land being for the purpose of a public road and outlet to grantee over same.”

There is a call in the deed “to the harbor limit,” and another call “parallel to said harbor line.” The inner shore line or line of ordinary high tide is not coincident with the government meander line. At ordinary high tide the water is from six to eight feet in depth at the latter line. The inner shore line is approximately 100 feet from the meander line, and the outer shore line or line of ordinary low tide is from two to three hundred feet distant from the latter line. The tract of land in controversy follows approximately the inner shore line. The court found that the reserved strip of land followed the meander line. The appellant contends that it follows the inner shore line. Measured upon the meander line, the distance call in the deed—148.3 feet—is correct. The inner shore line is approximately 39 feet longer.

It is manifest from the facts stated that the respondent's grantor only had title to one shore line, viz., the inner one. The meander line lies between the two shore lines. If the respondent's grantors intended to use the words “harbor limit” and “harbor line” as the equivalent of meander line, it seems certain that they used the words “along the shore line” advisedly and as meaning the inner shore line. If they intended to carry the description beyond the meander line, the same conclusion must follow. The reservation was made, as it recites, for the purpose of a public road. It is manifest that the grantors were not reserving a road upon the meander line where the water has a depth of from four to eight feet at

ordinary high tide. It was their intention to reserve a usable roadway. Moreover, the evidence shows that the strip of land in question had been used for several years prior to the execution of the respondent's deed as a roadway; that it connected with a public resort which the respondent's grantors were then carrying on; that they continued to use it until the decease of Warren Smith, which occurred in 1907 or 1908; that they expended money in keeping it in repair, and claimed it as a roadway.

Evidence was offered by the respondent to the effect that Warren Smith in his lifetime offered the roadway to the city if it would agree to maintain a bridge which spans a depression therein. The record shows conclusively that Smith, up to the time of his death, treated the tract in question as conforming to the reservation, and we think it is equally clear that the respondent, up to that time, entertained the same view. In May, 1909, the respondent leased a part of her land along the meander line for the term of three years, with an option of purchase to the lessee. This action was commenced in June, 1909. A short time before the commencement of the action, the respondent caused an obstruction to be placed across the road, which was immediately removed by the appellant. Aside from this obstruction, the roadway had been open and traveled by the public continuously for more than ten years when the action was commenced. In February, 1906, Smith and wife conveyed to a third party a tract of land adjoining the respondent's land and bordering upon the meander line, reserving a strip of land thirty feet in width along the government meander line to be used for a public highway. The respondent argues that this deed is corroborative of her contention that the strip reserved in her deed also followed that line. The fact that the later reservation is along the meander line does not tend to show that the words "along the shore line" in the earlier reservation mean along the meander line.

It is familiar law that parol testimony is admissible to

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show the circumstances under which a deed was made, to define technical terms, or to explain latent ambiguities. 4 Am. & Eng. Ency. Law (2d ed.), p. 795; *Sengfelder v. Hall*, 21 Wash. 371, 58 Pac. 250.

"The court must place itself as nearly as possible in the situation of the contracting parties at the time the deed was made, in order to ascertain their intent. The grant is to be construed with reference to the actual rightful state of the property at the time of the execution, and the law assumes that the parties refer to this for a definition of the terms made use of in their deed, and that they are least liable to make a mistake." 4 Am. & Eng. Ency. Law (2d ed.), p. 796, subd. 3.

The respondent must prevail, if she prevail at all, upon the strength of her own title. She cannot recover upon the weakness of her adversary's title. *Hughes v. South Bay School Dist. No. 11*, 32 Wash. 678, 73 Pac. 778, 74 Pac. 333; *George v. Columbia & Puget Sound R. Co.*, 38 Wash. 480, 80 Pac. 767; *Helm v. Johnson*, 40 Wash. 420, 82 Pac. 402.

To summarize, the respondent's grantors owned but one shore line. The reservation was made for a roadway, and the conduct of the parties to the instrument, together with the physical facts stated, makes it certain that the property in question is the property which the grantors intended to reserve and which the grantee understood was reserved.

The appellant contends that the strip of land in controversy is a public street, both by dedication and by prescription. The view we take of the case eliminates this issue. That question can only be determined in a suit between the proper parties. The respondent is without title and her suit must fail.

The judgment is reversed, with directions to dismiss the action.

PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10006. Department One. August 16, 1912.]

*In the Matter of the Estate of GARDNER GREENLEAF.*

GRACE G. DRUMMOND *et al.*, Appellants, v. STANLEY R.  
EVANS, Respondent.<sup>1</sup>

WILLS—PROBATE—NUNCUPATIVE WILLS—TIME FOR PROOF. Rem. & Bal. Code, § 1331, which provides that no "proof" shall be received of any nuncupative will unless offered within six months after speaking the testamentary words, refers to the testimony and not merely to the petition offering the will; and failure to offer the proofs within six months, is not excused by delay in consequence of the several pleas of the next of kin; in view of Rem. & Bal. Code, §§ 1297, 1302, providing that the court may immediately receive the proofs when the will is exhibited.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered July 1, 1911, admitting a will to probate, after a hearing on the merits. Reversed.

*Smith & Gresham*, for appellants, contended, among other things, that the proof was not admissible because not offered within six months. Rem. & Bal. Code, §§ 86, 1331; Ross Probate Law, p. 296; 16 Am. & Eng. Ency. Law (2d ed.), 1017; *Lindsay v. Scott*, 56 Wash. 206, 105 Pac. 462; *Galler v. McMahon*, 51 Wash. 473, 99 Pac. 309; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363; *In re Sullivan's Estate*, 40 Wash. 202, 82 Pac. 297, 111 Am. St. 895; *Martinez v. DeMartinez*, 19 Tex. Civ. App. 661, 48 S. W. 532; *Morgan v. Stevens*, 78 Ill. 287; *Godfrey v. Smith*, 73 Neb. 756, 103 N. W. 450; *State v. Poole*, 64 Wash. 47, 116 Pac. 468.

*A. W. Barry and Neal & Neal*, for respondent, contended, among other things, that probate in common form in this state applies only to written wills. Rem. & Bal. Code, §§ 1297, 1307, 1309; *Sutton v. Hancock*, 118 Ga. 436, 45 S. E. 504;

<sup>1</sup>Reported in 125 Pac. 789.

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*O'Callaghan v. O'Brien*, 116 Fed. 934, 943. Probate in solemn form proceeds upon citation to all interested parties and is the method adopted in this state for nuncupative wills. Rem. & Bal. Code, § 1331; *O'Callaghan v. O'Brien* and *Sutton v. Hancock*, *supra*; *Page v. Page*, 2 Rob. (Va.) \*424; *Hightower v. Williams*, 104 Ga. 608, 30 S. E. 862; *In re Miller's Estate*, 47 Wash. 253, 91 Pac. 967, 125 Am. St. 904, 13 L. R. A. (N. S.) 1092; *In re Sullivan's Estate*, 40 Wash. 202, 82 Pac. 297, 111 Am. St. 895.

Gose, J.—Gardner Greenleaf died in Okanogan county, in this state, on July 31, 1910. On August 31 following, one Stanley R. Evans filed his petition in the superior court of Okanogan county, wherein he alleged that the deceased, on the day preceding his death, made a nuncupative will in favor of the petitioner; and prayed that the will be admitted to probate, that he be appointed executor thereof, and that citation issue to the next of kin of the deceased that they might contest the will if they thought proper. The will was reduced to writing on the 29th day of August, 1910, and was made a part of the petition. On the 8th day of September, an order was entered directing that citation issue to the parties named in the order, the next of kin of the deceased, and on the same day the clerk of the court issued the citation.

On the 20th day of September, an order was entered, reciting that the return of the sheriff showed that none of the parties could be found in Okanogan county, and that the affidavit of counsel for the petitioner showed that each of the parties was a nonresident of the state, and directing that citation be served by publication. On the 28th day of November, the next of kin appeared specially and moved to quash the citation. On the same day, the petitioner moved for an order directing the clerk of the court to amend the citation by affixing the seal of the court thereto. On the 3d day of January, the latter motion was granted; and on the day

following, an order was entered directing that citation issue to the next of kin, requiring them to appear before the court on the 30th day of January, 1911, at the hour of ten o'clock a. m., and fixing that time for hearing the petition, proof, and contest of the will. On the date of the last order, the clerk issued the citation as directed.

On the return day of the order, the petitioner not appearing, on the motion of counsel for the next of kin, an order was entered by the court commissioner, dismissing the petition and denying the probate of the will. On the 4th day of April, upon the motion of the petitioner, the last named order was vacated, presumably upon the ground that a demurrer to the petition was pending when the order was made. On the same day, an order was entered, overruling the demurrer and setting the hearing on the petition for the 10th day of May. The hearing was had upon that day and more than nine months after the will was spoken. The demurrer is not in the record, and we are therefore not advised as to the grounds upon which it was based. After the first witness for the petitioner was sworn, and before the introduction of evidence, counsel for the next of kin objected to the admission of any evidence in support of the proffered will, on the ground that no proof of its pronouncement had been offered within six months after the testamentary words were spoken. The court received the evidence, and at the conclusion of the hearing, entered an order admitting the will to probate. The mother and sister, the only heirs of the deceased, have appealed; and contend that, under the statute, the evidence of the speaking of the will must be offered within six months after speaking the testamentary words. The respondent contends that the filing of the petition for the probate of the will within the six months is the offering of proof within the meaning of the statute.

The law of this state pertaining to the execution and proof of both written and nuncupative wills was enacted in 1854 (Laws 1854, p. 313 *et seq.*). This statute, page 315,

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§ 23 (Rem. & Bal. Code, § 1330), provides the method of making and proving a nuncupative will. Section 25 of the same statute (Rem. & Bal. Code, § 1331), provides the time within which proof shall be received of the pronouncement of such a will. This section is as follows:

“No proof shall be received of any nuncupative will unless it be offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, be first committed to writing, and a citation issued to the widow or next of kin of the deceased, that they may contest the will if they think proper.”

The intention of the legislature could not be more clearly expressed. It means that the testimony in support of the will shall not be received unless it be offered to a court of probate within six months after the testamentary words have been spoken. It will be observed that the word “petition” is not used. It seems too clear to require elucidation that the word “proof” was used as the legal equivalent of testimony or evidence. A reference to other sections of the act conducts the mind indubitably to this view. Section 17 (Rem. & Bal. Code, § 1297), provides that, when “any will” is exhibited to be proven, the court may immediately receive “the proof.” Section 20 (Rem. & Bal. Code, § 1300), provides that, in certain contingencies, “proof” shall be taken of the handwriting of the testator and of the witnesses dead, insane, or whose residence is unknown. Section 21 (Rem. & Bal. Code, § 1301), provides that, when all the subscribing witnesses are dead, insane, or the residence unknown, the court shall “take and receive proof” of the handwriting of the testator and subscribing witnesses. Section 22 (Rem. & Bal. Code, § 1302), provides that all the “testimony” adduced in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge of probate.

A reading of these several sections makes it as plain as written language can make it that the words “proof” and “testimony” are used interchangeably. The title of the act

is "An act relating to wills," and the act embraces both written and nuncupative wills, and provides who may make them, how they shall be made, and how they may be proved and admitted to probate. This court had occasion to consider the question of the relation of the several sections of the statute to each other, and their application to nuncupative wills, in *State ex rel. Stratton v. Tallman*, 25 Wash. 295, 65 Pac. 545, and it there held that Rem. & Bal. Code, § 1307, providing for the contest of a will within one year after its probate or rejection, applied to such a will. The fallacy of the respondent's contention is made more apparent by reading the petition with the evidence. The evidence shows that the petitioner was not present when the alleged will was spoken, and that his petition is based solely upon information gathered from other persons. Moreover, the rule obtains in this state, as elsewhere, that such wills must be strictly proved. *In re Miller's Estate*, 47 Wash. 253, 91 Pac. 967, 125 Am. St. 904, 13 L. R. A. (N. S.) 1092.

We have thus far treated the question as if it were an open one in this state. However, despite the ingenious and attractive argument of counsel to the contrary, we think the construction we have given the statute was squarely announced in *In re Sullivan's Estate*, 40 Wash. 202, 82 Pac. 297, 111 Am. St. 895. In that case a petition was filed for the probate of a nuncupative will. On the same day a citation was issued, directed to the widow and next of kin, citing them to appear on the same day, and reciting that the petition would be heard upon that day. The citation was filed on the same day, with the return of the officer that, after diligent search, he was unable to find the parties named in the citation in his county. Thereupon and on the same day, the court heard testimony and entered an order admitting the alleged will to probate. This was done within six months after the testamentary words were spoken. After holding that the order admitting the will to probate without service of citation was void, and after observing that the petition for the probate



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of the alleged will was filed within the time required by statute, and that the alleged words were reduced to writing and *proof* offered within the required time, the court said:

"The statute does not require that the citation shall necessarily be issued and served within six months after the testamentary words are spoken, but it does require that proof shall be offered within that time. We think, therefore, that respondent proposed the will for probate and offered her proof within the required time, and that she has not lost her opportunity to have her petition and proofs considered by the court."

The argument that the court there used the word "proof" as the equivalent of "petition" seems to us a strained construction of language that is so clear that it leaves the mind free from doubt as to what the court intended to hold.

We have stated the record at some length, because the respondent contends that the probate of a nuncupative will is in its nature a probate in solemn form; and that, if he was delayed in the introduction of his evidence in support of the will more than six months after the speaking of the testamentary words in consequence of the several pleas of the appellants, they cannot profit by the delay. This argument is answered by the statute. Rem. & Bal. Code, § 1297, provides that, when a will is exhibited to be proven, the court may immediately receive the proof; and § 1302 provides that all the testimony adduced in support of the will shall be reduced to writing, signed by the witnesses, and certified by the judge. Under these provisions, it was competent for the respondent to make his proof; that is, present his testimony in support of the proffered will, have it reduced to writing, signed by the witnesses, and certified by the judge at the time he exhibited it in written form to be proven, or at any time thereafter "within six months after speaking the testamentary words." He could then have caused citation to be issued to the widow or next of kin of the deceased, so that they could contest the will if they thought proper.

A similar argument was made in *Martinez v. De Martinez*, 19 Tex. Civ. App. 661, 48 S. W. 532. The petitioners there sought to evade the time limit fixed in the statute for the probate of a nuncupative will by showing that the appellee, by negotiations for a compromise and later by secreting herself so that she could not be cited in time to probate the will within six months from the time the testamentary words were spoken, prevented them from complying with the statute. The court said that to hold that the fraud of the appellee would excuse a compliance with the statute would be to "legislate or interpret into the statute something not contained therein." For the reasons stated, the court erred in admitting the alleged will to probate.

The judgment is reversed, with directions to enter an order rejecting it.

CROW, CHADWICK, FULLERTON, and PARKER, JJ., concur.

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[No. 10088. Department One. August 16, 1912.]

AUGUST ILSE, *Appellant*, v. AETNA INDEMNITY COMPANY,  
*Respondent*.<sup>1</sup>

LIMITATION OF ACTIONS — CONTRACT LIMITATION — INDEMNITY BOND—REASONABLE EXCUSE FOR DELAY. A limitation in an indemnity bond, requiring actions to be commenced within six months after the completion of the work, will be enforced, if there is no reasonable excuse for the delay; and it is not a reasonable excuse for a delay of three years that the plaintiff mistook his remedy upon advice of counsel, first unsuccessfully waging a suit upon an architect's certificate which he had obtained by fraudulent means, which suit was not dismissed until more than two years after the time for commencing the proper action had expired.

LIMITATION OF ACTIONS — FOREIGN CORPORATIONS — CONTRACT LIMITATIONS—EXCEPTIONS. The rule that statutes of limitations do not run in favor of a foreign corporation, because it is "out of the state" and so within the exception of Rem. & Bal. Code, § 168, has no

<sup>1</sup>Reported in 125 Pac. 780.

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application to the contract limitation in an indemnity bond which disclosed the foreign sovereignty of the company and names no exceptions.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 31, 1911, dismissing an action on an indemnity bond, upon sustaining a demurrer to the complaint. Affirmed.

*F. W. Girand and Robertson & Miller*, for appellant.

*Peters & Powell and W. E. Cullen*, for respondent.

GOSE, J.—This is a suit upon an indemnity bond. A demurrer to the complaint was sustained, and upon the plaintiff's statement that he would stand upon his complaint, a judgment of dismissal was entered. The plaintiff has appealed.

The bond, which is made a part of the complaint, provides:

"If any suits at law or proceedings in equity are brought against said surety to recover any claim hereunder, the same must be instituted within six months after the completion of the work specified in said contract."

The complaint alleges that the appellant had a contract for the erection of a courthouse and jail, in Shoshone county, the state of Idaho; that, on the 21st day of July, 1905, the International Fireproof Construction Company, a copartnership, undertook and agreed with him to do certain work thereon; that on the 31st day of July following, the copartners as principals and the respondent as a surety executed the bond in suit, conditioned for the faithful performance of their contract; that they failed to perform their contract and wholly abandoned it about the 1st day of April, 1906; that the appellant was compelled to and did complete the work required by their contract at an expense to him of \$15,000 in excess of the price for which they had contracted to do the work; that on the 15th day of February, 1907, the appellant commenced an action in the superior court of Spokane county, based upon the architect's certificate, to recover

the amount expended by him; that the action was dismissed without prejudice, and that, upon appeal to this court, the judgment was affirmed on the 4th day of November, 1909, the remittitur being filed in the court below on the 4th day of January, 1910; that the action was dismissed on the ground that the appellant had mistaken his remedy in suing upon the certificate of the architect instead of upon a *quantum meruit*, and,

“That plaintiff pursued his said remedy upon advice of counsel and any delay in instituting this action was occasioned by the facts hereinbefore set forth and an endeavor to determine his remedy and the said delay, if any, has not injured or placed the defendant at a disadvantage in the defense of said action, or at all.”

The original complaint in this case was verified July 19, 1910, and service was made on August 15 following. The suit is upon a *quantum meruit*. The bond runs directly to appellant, and recites that the respondent is “a corporation existing under and by virtue of the laws of the state of Connecticut.” A reference to the dates given discloses that this suit was commenced more than three years after “the completion of the work specified in said contract,” quoting from the stipulation in the bond, and more than six months after the filing of the remittitur from this court in the court below.

We think the demurrer was properly sustained. *Sheard v. United States Fidelity & Guaranty Co.*, 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276. In that case, in speaking of the legal effect of a clause in a bond fixing the time for the commencement of suits thereon, we said:

“The authorities generally agree that it is competent for the parties to an indemnity bond to fix a period of limitation different from that provided by statute, and we think the better rule is that the limitation, if reasonable—and there is no reasonable excuse for delay in the commencement of the action—is binding upon the parties. . . . To determine whether the limitation upon the commencement of the action is reasonable, the bond, the contract, and the facts of the particular case must be considered together.”

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A reference to the case of *Ilse v. Aetna Indemnity Co.*, 55 Wash. 487, 104 Pac. 787, the case referred to in the complaint, discloses that the appellant failed because the court found that he procured the architect's certificate, upon which he waged his suit, by fraudulent means. It seems quite plain that the wrongful acts of the appellant, which vitiated the architect's certificate and defeated him in the first case, cannot be held a "reasonable excuse for delay" in the commencement of this action. The averment in the complaint that the appellant "pursued his said remedy" in the first case upon the advice of counsel, means no more than that counsel assumed the integrity of the certificate.

The appellant has cited a line of authorities which hold that a foreign corporation cannot avail itself of the statute of limitations, even where it had continuously transacted business within the state for the statutory period before the commencement of the action, and had property and officers therein. These decisions are based upon statutes similar to Rem. & Bal. Code, § 168, and they hold that a foreign corporation is at all times "out of the state." They are rested on the principle that a corporation has no legal existence out of the boundaries of the sovereignty where it was created, and "that it must dwell in the place of its creation and cannot migrate to another sovereignty." Upon the authority of these cases, the appellant contends that the action was timely commenced. The cases are not in point. It must be remembered that our statute, Rem. & Bal. Code, § 168, is an exception to the general statute of limitations. Without this exception, the statute would run in favor of a foreign corporation to the same extent as a domestic corporation or a private individual.

We need not consider the meaning of the statute as applied to a foreign corporation, as we are here dealing with a contract limitation where the respondent's sovereignty is disclosed and no exceptions are named in the bond.

The judgment is affirmed.

ELLIS, PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10194. Department One. August 16, 1912.]

HOLT MANUFACTURING COMPANY, *Appellant*, v. L. O.  
THOMAS *et al.*, *Respondents*.<sup>1</sup>

ATTACHMENT — GROUNDS — DISPOSING OF PROPERTY TO HINDER CREDITORS—EVIDENCE—SUFFICIENCY. There is sufficient evidence to support an attachment on the ground that the debtors had disposed of their property with intent to defraud their creditors, where it appears that the debtors were insolvent, and owed four principal creditors \$34,000, that they had property of the value of \$24,000 to \$30,000, all of which they transferred by absolute conveyances to a creditor whose claim was \$5,000, who made inconsistent statements and claimed at first, according to several witnesses, that he took the property as security for his claim and a surety claim of \$6,000, and afterwards offered to pay off other creditors who were not consulted; and there was evidence that the debtors' purpose was to prevent the attaching creditor from carrying out threats to enforce its claim by suit; the fact that they intended to prefer a creditor, as claimed by them, not being sufficient to warrant a dissolution of the attachment, where it appears that they also intended to hinder and delay other creditors and that the preferred creditor aided therein.

APPEAL—REVIEW—HEARING ON AFFIDAVITS. Upon reviewing an order dissolving an attachment, the supreme court is not called upon to follow the findings of the lower court upon disputed questions of fact, where the hearing was entirely upon affidavits.

FULLERTON, J., dissents.

Appeal from an order of the superior court for Adams county, Pendergast, J., entered November 28, 1911, dissolving an attachment, after a hearing before the court upon affidavits. Reversed.

W. W. Zent, for appellant.

Lovell & Davis, for respondents.

PARKER, J.—The plaintiff commenced this action in the superior court seeking recovery from the defendants upon two promissory notes and an open account aggregating approximately \$5,000. At the same time, the plaintiff sued

<sup>1</sup>Reported in 125 Pac. 772.

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out a writ of attachment against the property of defendants upon the ground that they had assigned, secreted, and disposed of their property with the intention to delay or defraud their creditors. The defendant moved the court to dissolve the attachment, alleging that it was wrongfully issued. The motion came on for hearing before the court upon evidence produced in the form of affidavits only, in behalf of the respective parties; the only issue involved being as to whether or not the defendants had made disposition of their property with intention to delay or defraud their creditors. This issue being submitted on these affidavits, the court entered its order dissolving the attachment. From this order, the plaintiff has appealed.

On the 2d day of October, 1911, and for some time prior thereto, respondents were engaged in farming on an extensive scale, in Adams county. On that date they were insolvent, and owed their principal creditors approximately as follows:

W. J. Bennington .....	\$5,000
Pioneer National Bank of Ritzville.....	\$12,000
Bank of Lind .....	\$12,000
Holt Manufacturing Co. (Appellant) .....	\$5,000

The total value of their property at that time, which consisted of land, stock, farm implements, and wheat on hand, was between \$24,000 and \$30,000. A few days prior to October 2d, the vice president of appellant had a conversation with both of respondents in which payment of the amount due upon the indebtedness here sued upon was demanded of them, and in which conversation they were given to understand that legal proceedings would be promptly taken looking to the securing and collection of their indebtedness to appellant unless it was immediately paid. They then pleaded for an extension of time, promising to pay at least \$2,400 upon the indebtedness in a few days when they would sell some of their wheat, and promising to meet a representative of appellant at Lind and make the \$2,400 payment on

October 4th. On that day or possibly the day previous, in a telephone conversation with the vice president of appellant, one of respondents informed him that they would not meet the representative of appellant at the time stated and would do nothing more for appellant, as other arrangements had been made. On October 2d and 3d, which was after the understanding had as to the payment of the \$2,400 and before the agreed time for such payment had arrived, respondents executed two bills of sale and a quitclaim deed conveying substantially all of their personal property and land, which was of the value of \$24,000 or more, to W. J. Bennington. These facts we think may be considered as established beyond dispute.

These conveyances to Bennington were absolute in form, contained no provisions indicating that they were given as security, nor that Bennington was taking the title to the property in trust for any other creditor than himself. It is now claimed, however, by respondents and Bennington that these conveyances were made to him in trust for the payment of the claims of himself, the Pioneer National Bank of Ritzville, and the Bank of Lind, in this order. These claims, as we have already noticed, would aggregate approximately \$30,000. We will now notice the principal statements made in the several affidavits of witnesses relating to facts which are more or less in dispute.

One witness states in his affidavit, in substance, that on October 6th Bennington said he was not acting in the interest of any one else in taking the property by these conveyances, and that they were taken to secure him in the sum of \$5,000 owing to him by respondents, and also to secure him to the extent of \$6,000 for which sum he was surety for respondents. This \$6,000 was evidently a part of the indebtedness owing by the respondents to one of the banks. This witness also states that Bennington stated to him at that time that the conveyances were taken as security only and intended as mortgages.



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Another witness stated in his affidavit, in substance, that on October 6th he heard a conversation between Bennington and the witness above mentioned, which conversation was evidently the same one above mentioned, wherein Bennington stated that the conveyances were made only as security to him and that he had not purchased the property.

Two other witnesses stated in their affidavits, in substance, that on about October 20th they had a conversation with both of respondents, wherein they stated, in substance, that appellant as one of their creditors had made unreasonable demands on them and was crowding them for the payment of the indebtedness due it, and had threatened defendants with suit and attachment unless the same was settled; that they had gone to their friend Bennington and advised him of the acts and threats of appellant, and at the suggestion of Bennington they then transferred to him all of their real and personal property, and that the transfer had been made for the purpose of preventing appellant from getting any undue advantage; that Bennington being then present, claimed that he was going to use the property for the purpose of realizing on his own claim first, and thereafter he would turn the balance over to the Pioneer National Bank of Ritzville and the Bank of Lind. These witnesses also state that respondents said that Bennington advised them to transfer their property to him for the purpose of preventing appellant from carrying out its threat to enforce its claim.

Another witness, who is interested in the Bank of Lind and represented it, states in his affidavit, in substance, that he had a conversation with Bennington about the 6th or 7th of October relating to the conveyance of the property to him by respondents, wherein Bennington stated that the conveyances had been made to him as security only to secure what respondents were then owing him and to secure him on certain notes that he was surety on for them payable to the Pioneer National Bank of Ritzville; Bennington further stating to the witness at that time that, if the defendants could be

reinstated upon the ranch in Adams county, that he would agree with the witness for the Bank of Lind that the property should be treated as security for the amount owing the Bank of Lind by respondents as well as for the amount owing him, and that the proceeds of the property would be by him distributed *pro rata* to the Bank of Lind, to Bennington, and to the Pioneer National Bank of Ritzville, provided, however, that the witness would comply with certain conditions named in aiding and assisting Bennington to reinstate the defendants upon the ranch. The witness further states that at no time did the Bank of Lind, nor any one acting for it authoritatively, take or receive from defendants any property in settlement of their indebtedness to it, and that it has since brought suit to recover such indebtedness.

Another witness, the president of the Pioneer National Bank of Ritzville, states in his affidavit that he agreed with respondents and Bennington that the conveyances should be made to Bennington in trust for the payment of the claims of Bennington, the Pioneer National Bank of Ritzville, and the Bank of Lind, in this order. It is not claimed by him that such agreement or understanding was evidenced in writing.

The substance of the affidavits of the respondents is that they did not make the conveyances with intent to defraud their creditors, but that such conveyances were made to Bennington for the purpose of paying the indebtedness due him, the Pioneer National Bank of Ritzville, and the Bank of Lind. Whether or not respondents understood that those claims were to be paid in this order does not appear from anything they have stated in their affidavits. They claim, however, that the conveyances were absolute, and were not made with intent to delay or defraud their creditors.

Another witness, one of the attorneys for respondents, states that he was present at the making of the conveyances, was in consultation with respondents, that he heard all the conversation leading up to the making of the conveyances, and that they were not made as security but as an absolute

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transfer to Bennington; and that Bennington then delivered to respondents all of the evidence of indebtedness he had against them. The affidavit of this witness is silent upon the question of how the surplus was to be applied by Bennington after the satisfaction of his own claim. We think the foregoing is a fair summary of all of the principal facts disclosed by the affidavits.

Whether or not these facts show an intent on the part of respondents to delay or defraud their creditors, and especially appellant, within the meaning of the attachment law, is the problem for our solution. What the intention of respondents and Bennington was in that respect is to be determined by their acts and words which were seen and heard by others, much more than by what they may now say that their intentions were at the time. It may be conceded that they intended to prefer Bennington as a creditor and still not be subject to the charge of intending to delay and defraud appellant or other creditors; but if the circumstances proven show that they intended the latter as well as the former, the conveyances made with such intention would support attachment proceedings at the instance of this appellant. In *Bump on Fraudulent Conveyances* (4th ed.), §§ 172, 173, following a statement of the general rule of law allowing honest preference to creditors, the author says:

“A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts. While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid, or to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from their claims or to delay, hinder, and embarrass them in the enforcement of their demands. . . .

"The amount of the property transferred compared with the debt intended to be secured or paid, and the number, amount, and character of the other debts, are proper subjects for consideration in determining the good faith of the transaction towards other creditors. The property must bear a reasonable proportion to the preferred debt."

And at § 174 the author further observes:

"Creditors also are not allowed to gain a preference by means of a secret undertaking to hold a part of the property for the benefit of the debtor. The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors."

In *Ellis v. Musselman*, 61 Neb. 262, 85 N. W. 75, in considering the effect of an intent to prefer a creditor with an intention to defraud other creditors, the court observed:

"It is true that Joseph Ellis was indebted to his sons at the time he conveyed to them the land in question, but that fact did not necessarily make the conveyances valid, nor shield them from the assaults of creditors. The plaintiffs in error might lawfully accept security from their father, but it was not permissible for them to do so with the intention of defrauding other creditors. If a conveyance is the product of two motives, one innocent and the other corrupt, it is, according to all the authorities, within the proscription of the statute of frauds."

In the same decision the court quotes with approval the text in 14 Am. & Eng. Ency. Law (2d ed.), pp. 295, 296, as follows:

"Although a creditor who obtains from an insolvent debtor an assignment of property in payment of, or as security for, his debt, may know that his debtor is acting with the design of delaying and defrauding other creditors, he will not lose his preference, by reason of such knowledge, if he takes the assignment in good faith, and without any view of aiding in the consummation of the purpose, further than necessarily results from securing a preference to himself. If, however, it appears from the circumstances attending the

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transaction that the preferred creditor was not acting with the sole purpose of securing the payment of his own debt, but also from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit the creditor will not be protected, but the transaction will be declared fraudulent.' "

The following decisions of this court are in harmony with these views: *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 163; *Hotaling Co. v. Clancy*, 21 Wash. 1, 56 Pac. 929; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347. In the last cited case, it is true, the court declined to set aside the conveyances as a fraudulent preference, but nevertheless the principles recognized in that decision are in harmony with the views indicated by the above quotations.

Now the main facts disclosed by these affidavits pointing to an intent on the part of respondents to delay and defraud this appellant as one of its creditors we think may be fairly summarized as follows: First, insolvency of respondents at the time of the conveyances with full knowledge thereof and full knowledge of the affairs of respondents and of the indebtedness due from them to appellant and of appellant's purpose to enforce the same, on the part of Bennington who accepted the conveyances; second, the conveyances made to Bennington absolute in form, without any language therein or in any other instrument of writing expressing any such trust for the benefit of the banks in addition to himself as is now claimed by him and respondents; third, conveyance of the property to Bennington having a value of at least twice the amount of the indebtedness due from respondents to him including the amount of his surety obligation incurred in their behalf; fourth, friendly concern on the part of Bennington for respondents, evidenced by his advice to them to make conveyance to him of all their property beyond that which would be reasonably sufficient to satisfy his own claim, and also evidenced by his offer to the president of the Bank of Lind to share *pro rata* with it in the payment of its claim

against respondents upon condition that its president would aid in reinstating respondents upon the farm; also evidenced by his concern in the efforts of respondents to thwart any legal proceedings which might be instituted by appellant looking to the collection of its claim, his efforts in this regard going far beyond what was necessary to secure a fair preference to himself as a creditor; fifth, inconsistent statements made by Bennington as to the purpose of the conveyances; sixth, concern of respondents indicating their desire to hinder and delay appellant in the collection of its claim as well as a desire to merely prefer other creditors; seventh, the statement of the attorney for respondents to the effect that the sale was absolute and intended so to be by respondents and Bennington, yet failing to state any facts indicating the nature of the claimed trust in favor of the banks.

It may not be easy to point out among these facts any particular one which of itself shows an intent on the part of respondents to delay and defraud appellant by these conveyances; but it is probably seldom that such an intent can be shown by other than a series of acts. We think that, taking all of the facts shown by these affidavits, making due allowance for the conflicting statements therein, there is sufficient here shown to require our holding that respondents in making these conveyances did so not for the sole purpose of preferring *bona fide* creditors, but also with the specific intent to hinder, delay and defraud this appellant as a creditor. We think that both they and Bennington, in the making of these conveyances, did not manifest that degree of good faith and fairness which the law demands in the conveyance of property by an insolvent debtor to one of his creditors for the purpose of discharging the debt owing such creditor. Clearly, if these conveyances were made to Bennington for the purpose of discharging his debt alone, they were fraudulent and void as to other creditors because of the manifest excessive value of the property conveyed over and above the amount of the obligation sought to be satisfied; and we are not at all im-

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pressed with the claim that the surplus value was to be in trust for the banks. Even if such were the original intention of respondents and Bennington, the facts point to the intent of both respondents and Bennington to delay and defraud appellant. We think such intent is sufficiently shown to render the conveyances void as to appellant.

Some effort is made to invoke the general rule that this court should not arrive at a different decision than that of the trial court upon a disputed question of fact. That rule has but little application here, because no oral evidence was submitted to the trial court and it had no better opportunity to see or hear the witnesses than we have. Indeed, the question was not even determined by a resident judge, but was submitted to a visiting judge from another district. The reason for the rule invoked is therefore not present in this case.

We are of the opinion that the trial court erroneously dissolved the attachment. It follows that the order to that effect must be reversed. It is so ordered.

GOSE, CROW, and CHADWICK, JJ., concur.

FULLERTON, J., dissents.

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[Nos. 10324, 10306-10316. Department One. August 16, 1912.]

G. W. HAPGOOD *et al.*, *Appellants*, v. THE CITY OF SEATTLE,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 7571, which provides that it shall be lawful for a city of the first class to order any improvements the cost of which is to be charged to abutting property when said cost shall not exceed fifty per cent of the valuation of the real estate in the improvement district, a property owner cannot complain of an improvement the cost of which exceeds fifty per cent of such valuation, where no more than such fifty per cent is assessed against the benefited property and the balance is provided by the city from its general fund or other sources.

<sup>1</sup>Reported in 125 Pac. 965.

**SAME—LIMITATION—IMPROVEMENT DISTRICT.** Rem. & Bal. Code, § 7571, limiting assessments for local improvements to fifty per cent of the valuation of the real estate within the improvement district, does not limit each assessment to fifty per cent of the value of each lot assessed, nor the total assessment to fifty per cent of the value of all the lots assessed; but the limit of the assessable cost is fixed by the total valuation of the real estate within the entire district, even if some of the property therein is not benefited and not subject to assessment.

**SAME—REASSESSMENT—PROPERTY LIABLE.** The fact that property has been assessed for an improvement, does not prevent a reassessment for an additional charge to make up a deficit arising when part of the assessments were held invalid, such reassessment being expressly authorized by Rem. & Bal. Code, § 7893, to the extent of the benefit which the property received from the improvements.

**SAME—REASSESSMENT—INVALIDITY OF ORIGINAL ASSESSMENT.** Under Rem. & Bal. Code, § 7894, providing for reassessments where the invalidity of the original assessment is established "either directly or by virtue of any decision of the courts," a reassessment is *prima facie* authorized where a portion of the lots, found by the jury to be damaged, were adjudged nonassessable for that reason, and the city council by resolution cancelled the same and other like assessments for the same reason.

**SAME—REASSESSMENTS—PROPERTY DAMAGED.** Where assessments were adjudged illegal for the reason that the property was found by the jury to be damaged and was therefore nonassessable, such property cannot be subjected to a reassessment, although it may in fact have been benefited, the former adjudication being final.

Appeals from judgments of the superior court for King county, Myers, J., entered January 10, 1912, confirming an assessment, upon appeals from the city council. Affirmed.

*Ballinger, Battle, Hulbert & Shorts, Wm. Hickman Moore, Edwin C. Ewing, McClure & McClure, Brady & Rummens, Peters & Powell, Byers & Byers, Wm. Martin, and W. A. Keene,* for appellants.

*James E. Bradford, William B. Allison, Leander T. Turner, and Preston & Thorgrimson,* for respondent.

PARKER, J.—These are appeals from judgments of the superior court for King county, affirming the action of the city council of Seattle in making and confirming a supple-



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mental assessment against property of appellants for the cost of a local street improvement. The same contentions are made by appellants in each case, in this court, so our discussion and conclusions will apply alike to all.

In December, 1905, the city council of Seattle passed Ordinance No. 13,102 providing for the change of grades of Jackson and other streets in the city, providing for the institution of condemnation proceedings to acquire and damage property rights as against the owners of abutting property necessary to the making of such change of grades, and providing for the levying of special assessments by eminent domain commissioners against property benefited by such change of grades to pay the damages awarded in such proceedings, as authorized by the eminent domain law applicable to cities. While this ordinance did not make provision for the construction of the physical improvement, it manifestly contemplated the making of such improvement upon acquiring the right to damage abutting property by the change of the grades. Thereafter in February, 1906, the city council passed Ordinance No. 13,309, providing for the improvement of Jackson and other streets by the change of the grades thereof, as contemplated by the condemnation Ordinance No. 13,102, creating a local improvement district and providing for the payment of the cost of the improvement by special assessment against the property of the district benefited thereby; such assessment to be levied by the city council in pursuance of statute, charter, and ordinance provisions applicable to local improvement assessments in the city. A contract for the construction of the improvement having been entered into by the city, an assessment was accordingly levied against the property in the district by the city, which was confirmed by Ordinance No. 17,126, in October, 1907. Thereafter in August, 1910, the city council passed Ordinance No. 24,827 cancelling of record assessments charged against certain of the property within the district, reciting and providing in that ordinance as follows:

"Whereas, under Ordinance No. 13,309 of the city of Seattle, creating local improvement district No. 1,213 there was improved Jackson street and certain parts of certain other streets and avenues; and

"Whereas, said ordinance authorizing said improvement required that all property abutting adjacent or proximate to said portion of said streets and avenues, named and described in section one thereof, to such distance back from the marginal lines thereof as prescribed by the city charter, should be deemed to be property specially benefited by said improvement, and that the total cost and expense of such improvement should be defrayed by the collection of special assessments against such property; and

"Whereas, certain tracts, pieces and parcels of land within the limits of said district, as created by said ordinance, were by the jury impanelled for the ascertainment of damages in the condemnation proceedings had for the establishment of the regrade elevations in said local improvement district, found to be damaged by reason of said regrade; and . . .

"Whereas, under certain decisions of the supreme court of the state of Washington, certain assessments in said local improvement district are null and void either in whole or in part; now, therefore, be it ordained by the city of Seattle as follows:

"Section 1. That the assessments levied against the lots, parcels, pieces and tracts of land hereinafter in this section enumerated, for the improvement of Jackson street, and certain parts of certain other streets and avenues, all in the city of Seattle, under Ordinance No. 13,309, creating local improvement district No. 1,213, be, and the same hereby are, cancelled and annulled, to wit: . . . ."

It is manifest from the record that the passage of this ordinance was prompted by the result of certain litigation prosecuted by owners of certain property charged by the original assessment with a portion of the cost of the improvement, culminating in the decisions of this court in the cases of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, and *Seattle & Puget Sound Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093, where it was held that property which is found by the jury in a condemnation proceeding to be damaged is not chargeable by assessment with any of the cost of the

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improvement contemplated by such condemnation proceeding. Under these decisions, the assessments thus cancelled of record by this ordinance were invalid and unenforcible. It is also apparent from the record that the passage of this ordinance was intended as a preliminary step to the making of a reassessment, by "supplemental assessment" as the city called it, under the authority of the reassessment law, and the reassessment provisions of the city charter, which are in substance the same. Rem. & Bal. Code, § 7893 and following; City Charter, art. 8, § 18.

Thereafter, in December, 1910, the city council passed Ordinance No. 25,840 providing for a supplemental assessment against the benefited property within the district, to make up the deficiency caused by the invalidity of the assessments cancelled of record by Ordinance No. 24,827. An assessment roll was made up accordingly, omitting therefrom all charges against property which had been found to be damaged in the condemnation proceeding and against which the invalid cancelled assessments had been levied by the original assessment, and charging the deficiency caused thereby against other property in the district, including the property of these appellants which had already been assessed by the original assessment. Notice of hearing upon this supplemental assessment was given as the law directs, when these appellants filed their objections thereto, which were by the council overruled and the supplemental assessment roll confirmed in May, 1911, by Ordinance No. 27,259. Appeals were taken by the objectors, to the superior court, from that confirmation; and the decision of that court being adverse to them, they have appealed to this court. The original assessment, in so far as it was valid, was not disturbed or changed by the supplemental assessment; but the supplemental assessment was made in addition thereto. This seems to account for the city giving the new assessment that name rather than the name of "reassessment," as it is called in the law and charter provisions under which it was made. This, however, does not

reinstated upon the ranch in Adams county, that he would agree with the witness for the Bank of Lind that the property should be treated as security for the amount owing the Bank of Lind by respondents as well as for the amount owing him, and that the proceeds of the property would be by him distributed *pro rata* to the Bank of Lind, to Bennington, and to the Pioneer National Bank of Ritzville, provided, however, that the witness would comply with certain conditions named in aiding and assisting Bennington to reinstate the defendants upon the ranch. The witness further states that at no time did the Bank of Lind, nor any one acting for it authoritatively, take or receive from defendants any property in settlement of their indebtedness to it, and that it has since brought suit to recover such indebtedness.

Another witness, the president of the Pioneer National Bank of Ritzville, states in his affidavit that he agreed with respondents and Bennington that the conveyances should be made to Bennington in trust for the payment of the claims of Bennington, the Pioneer National Bank of Ritzville, and the Bank of Lind, in this order. It is not claimed by him that such agreement or understanding was evidenced in writing.

The substance of the affidavits of the respondents is that they did not make the conveyances with intent to defraud their creditors, but that such conveyances were made to Bennington for the purpose of paying the indebtedness due him, the Pioneer National Bank of Ritzville, and the Bank of Lind. Whether or not respondents understood that those claims were to be paid in this order does not appear from anything they have stated in their affidavits. They claim, however, that the conveyances were absolute, and were not made with intent to delay or defraud their creditors.

Another witness, one of the attorneys for respondents, states that he was present at the making of the conveyances, was in consultation with respondents, that he heard all the conversation leading up to the making of the conveyances, and that they were not made as security but as an absolute

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transfer to Bennington; and that Bennington then delivered to respondents all of the evidence of indebtedness he had against them. The affidavit of this witness is silent upon the question of how the surplus was to be applied by Bennington after the satisfaction of his own claim. We think the foregoing is a fair summary of all of the principal facts disclosed by the affidavits.

Whether or not these facts show an intent on the part of respondents to delay or defraud their creditors, and especially appellant, within the meaning of the attachment law, is the problem for our solution. What the intention of respondents and Bennington was in that respect is to be determined by their acts and words which were seen and heard by others, much more than by what they may now say that their intentions were at the time. It may be conceded that they intended to prefer Bennington as a creditor and still not be subject to the charge of intending to delay and defraud appellant or other creditors; but if the circumstances proven show that they intended the latter as well as the former, the conveyances made with such intention would support attachment proceedings at the instance of this appellant. In *Bump on Fraudulent Conveyances* (4th ed.), §§ 172, 173, following a statement of the general rule of law allowing honest preference to creditors, the author says:

“A transfer, however, may be fraudulent, although it is made in consideration of an honest debt, for an honest claim may be used as a cover to a covinous transaction. The distinction is between a transfer made solely by way of preference of one creditor over others, and a similar transfer made with a design to secure some benefit or advantage therefrom to the debtor, or to delay creditors in the collection of their debts. While the law permits an insolvent debtor to make choice of the persons he will pay, it denies him the right in doing it to contrive that other creditors shall never be paid, or to use the debt of the preferred creditor as a colorable consideration to screen and protect his property from their claims or to delay, hinder, and embarrass them in the enforcement of their demands. . . .

"The amount of the property transferred compared with the debt intended to be secured or paid, and the number, amount, and character of the other debts, are proper subjects for consideration in determining the good faith of the transaction towards other creditors. The property must bear a reasonable proportion to the preferred debt."

And at § 174 the author further observes:

"Creditors also are not allowed to gain a preference by means of a secret undertaking to hold a part of the property for the benefit of the debtor. The law looks with great jealousy upon the manner of giving preferences, and denounces all departures from good faith, and requires that the parties shall not secure any covert advantage to the debtor in prejudice of his creditors."

In *Ellis v. Musselman*, 61 Neb. 262, 85 N. W. 75, in considering the effect of an intent to prefer a creditor with an intention to defraud other creditors, the court observed:

"It is true that Joseph Ellis was indebted to his sons at the time he conveyed to them the land in question, but that fact did not necessarily make the conveyances valid, nor shield them from the assaults of creditors. The plaintiffs in error might lawfully accept security from their father, but it was not permissible for them to do so with the intention of defrauding other creditors. If a conveyance is the product of two motives, one innocent and the other corrupt, it is, according to all the authorities, within the proscription of the statute of frauds."

In the same decision the court quotes with approval the text in 14 Am. & Eng. Ency. Law (2d ed.), pp. 295, 296, as follows:

"Although a creditor who obtains from an insolvent debtor an assignment of property in payment of, or as security for, his debt, may know that his debtor is acting with the design of delaying and defrauding other creditors, he will not lose his preference, by reason of such knowledge, if he takes the assignment in good faith, and without any view of aiding in the consummation of the purpose, further than necessarily results from securing a preference to himself. If, however, it appears from the circumstances attending the

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transaction that the preferred creditor was not acting with the sole purpose of securing the payment of his own debt, but also from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit the creditor will not be protected, but the transaction will be declared fraudulent.' "

The following decisions of this court are in harmony with these views: *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 163; *Hotaling Co. v. Clancy*, 21 Wash. 1, 56 Pac. 929; *National Surety Co. v. Udd*, 65 Wash. 471, 118 Pac. 347. In the last cited case, it is true, the court declined to set aside the conveyances as a fraudulent preference, but nevertheless the principles recognized in that decision are in harmony with the views indicated by the above quotations.

Now the main facts disclosed by these affidavits pointing to an intent on the part of respondents to delay and defraud this appellant as one of its creditors we think may be fairly summarized as follows: First, insolvency of respondents at the time of the conveyances with full knowledge thereof and full knowledge of the affairs of respondents and of the indebtedness due from them to appellant and of appellant's purpose to enforce the same, on the part of Bennington who accepted the conveyances; second, the conveyances made to Bennington absolute in form, without any language therein or in any other instrument of writing expressing any such trust for the benefit of the banks in addition to himself as is now claimed by him and respondents; third, conveyance of the property to Bennington having a value of at least twice the amount of the indebtedness due from respondents to him including the amount of his surety obligation incurred in their behalf; fourth, friendly concern on the part of Bennington for respondents, evidenced by his advice to them to make conveyance to him of all their property beyond that which would be reasonably sufficient to satisfy his own claim, and also evidenced by his offer to the president of the Bank of Lind to share *pro rata* with it in the payment of its claim



against respondents upon condition that its president would aid in reinstating respondents upon the farm; also evidenced by his concern in the efforts of respondents to thwart any legal proceedings which might be instituted by appellant looking to the collection of its claim, his efforts in this regard going far beyond what was necessary to secure a fair preference to himself as a creditor; fifth, inconsistent statements made by Bennington as to the purpose of the conveyances; sixth, concern of respondents indicating their desire to hinder and delay appellant in the collection of its claim as well as a desire to merely prefer other creditors; seventh, the statement of the attorney for respondents to the effect that the sale was absolute and intended so to be by respondents and Bennington, yet failing to state any facts indicating the nature of the claimed trust in favor of the banks.

It may not be easy to point out among these facts any particular one which of itself shows an intent on the part of respondents to delay and defraud appellant by these conveyances; but it is probably seldom that such an intent can be shown by other than a series of acts. We think that, taking all of the facts shown by these affidavits, making due allowance for the conflicting statements therein, there is sufficient here shown to require our holding that respondents in making these conveyances did so not for the sole purpose of preferring *bona fide* creditors, but also with the specific intent to hinder, delay and defraud this appellant as a creditor. We think that both they and Bennington, in the making of these conveyances, did not manifest that degree of good faith and fairness which the law demands in the conveyance of property by an insolvent debtor to one of his creditors for the purpose of discharging the debt owing such creditor. Clearly, if these conveyances were made to Bennington for the purpose of discharging his debt alone, they were fraudulent and void as to other creditors because of the manifest excessive value of the property conveyed over and above the amount of the obligation sought to be satisfied; and we are not at all im-



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pressed with the claim that the surplus value was to be in trust for the banks. Even if such were the original intention of respondents and Bennington, the facts point to the intent of both respondents and Bennington to delay and defraud appellant. We think such intent is sufficiently shown to render the conveyances void as to appellant.

Some effort is made to invoke the general rule that this court should not arrive at a different decision than that of the trial court upon a disputed question of fact. That rule has but little application here, because no oral evidence was submitted to the trial court and it had no better opportunity to see or hear the witnesses than we have. Indeed, the question was not even determined by a resident judge, but was submitted to a visiting judge from another district. The reason for the rule invoked is therefore not present in this case.

We are of the opinion that the trial court erroneously dissolved the attachment. It follows that the order to that effect must be reversed. It is so ordered.

GOSE, CROW, and CHADWICK, JJ., concur.

FULLERTON, J., dissents.

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[Nos. 10324, 10306-10316. Department One. August 16, 1912.]

G. W. HAPGOOD *et al.*, *Appellants*, v. THE CITY OF SEATTLE,  
*Respondent*.<sup>1</sup>

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 7571, which provides that it shall be lawful for a city of the first class to order any improvements the cost of which is to be charged to abutting property when said cost shall not exceed fifty per cent of the valuation of the real estate in the improvement district, a property owner cannot complain of an improvement the cost of which exceeds fifty per cent of such valuation, where no more than such fifty per cent is assessed against the benefited property and the balance is provided by the city from its general fund or other sources.

<sup>1</sup>Reported in 125 Pac. 965.

**SAME—LIMITATION—IMPROVEMENT DISTRICT.** Rem. & Bal. Code, § 7571, limiting assessments for local improvements to fifty per cent of the valuation of the real estate within the improvement district, does not limit each assessment to fifty per cent of the value of each lot assessed, nor the total assessment to fifty per cent of the value of all the lots assessed; but the limit of the assessable cost is fixed by the total valuation of the real estate within the entire district, even if some of the property therein is not benefited and not subject to assessment.

**SAME—REASSESSMENT—PROPERTY LIABLE.** The fact that property has been assessed for an improvement, does not prevent a reassessment for an additional charge to make up a deficit arising when part of the assessments were held invalid, such reassessment being expressly authorized by Rem. & Bal. Code, § 7893, to the extent of the benefit which the property received from the improvements.

**SAME—REASSESSMENT—INVALIDITY OF ORIGINAL ASSESSMENT.** Under Rem. & Bal. Code, § 7894, providing for reassessments where the invalidity of the original assessment is established "either directly or by virtue of any decision of the courts," a reassessment is *prima facie* authorized where a portion of the lots, found by the jury to be damaged, were adjudged nonassessable for that reason, and the city council by resolution cancelled the same and other like assessments for the same reason.

**SAME—REASSESSMENTS—PROPERTY DAMAGED.** Where assessments were adjudged illegal for the reason that the property was found by the jury to be damaged and was therefore nonassessable, such property cannot be subjected to a reassessment, although it may in fact have been benefited, the former adjudication being final.

Appeals from judgments of the superior court for King county, Myers, J., entered January 10, 1912, confirming an assessment, upon appeals from the city council. Affirmed.

*Ballinger, Battle, Hulbert & Shorts, Wm. Hickman Moore, Edwin C. Ewing, McClure & McClure, Brady & Rummens, Peters & Powell, Byers & Byers, Wm. Martin, and W. A. Keene, for appellants.*

*James E. Bradford, William B. Allison, Leander T. Turner, and Preston & Thorgrimson, for respondent.*

**PARKER, J.**—These are appeals from judgments of the superior court for King county, affirming the action of the city council of Seattle in making and confirming a supple-

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mental assessment against property of appellants for the cost of a local street improvement. The same contentions are made by appellants in each case, in this court, so our discussion and conclusions will apply alike to all.

In December, 1905, the city council of Seattle passed Ordinance No. 13,102 providing for the change of grades of Jackson and other streets in the city, providing for the institution of condemnation proceedings to acquire and damage property rights as against the owners of abutting property necessary to the making of such change of grades, and providing for the levying of special assessments by eminent domain commissioners against property benefited by such change of grades to pay the damages awarded in such proceedings, as authorized by the eminent domain law applicable to cities. While this ordinance did not make provision for the construction of the physical improvement, it manifestly contemplated the making of such improvement upon acquiring the right to damage abutting property by the change of the grades. Thereafter in February, 1906, the city council passed Ordinance No. 13,309, providing for the improvement of Jackson and other streets by the change of the grades thereof, as contemplated by the condemnation Ordinance No. 13,102, creating a local improvement district and providing for the payment of the cost of the improvement by special assessment against the property of the district benefited thereby; such assessment to be levied by the city council in pursuance of statute, charter, and ordinance provisions applicable to local improvement assessments in the city. A contract for the construction of the improvement having been entered into by the city, an assessment was accordingly levied against the property in the district by the city, which was confirmed by Ordinance No. 17,126, in October, 1907. Thereafter in August, 1910, the city council passed Ordinance No. 24,827 cancelling of record assessments charged against certain of the property within the district, reciting and providing in that ordinance as follows:

"Whereas, under Ordinance No. 13,309 of the city of Seattle, creating local improvement district No. 1,213 there was improved Jackson street and certain parts of certain other streets and avenues; and

"Whereas, said ordinance authorizing said improvement required that all property abutting adjacent or proximate to said portion of said streets and avenues, named and described in section one thereof, to such distance back from the marginal lines thereof as prescribed by the city charter, should be deemed to be property specially benefited by said improvement, and that the total cost and expense of such improvement should be defrayed by the collection of special assessments against such property; and

"Whereas, certain tracts, pieces and parcels of land within the limits of said district, as created by said ordinance, were by the jury impanelled for the ascertainment of damages in the condemnation proceedings had for the establishment of the regrade elevations in said local improvement district, found to be damaged by reason of said regrade; and . . . .

"Whereas, under certain decisions of the supreme court of the state of Washington, certain assessments in said local improvement district are null and void either in whole or in part; now, therefore, be it ordained by the city of Seattle as follows:

"Section 1. That the assessments levied against the lots, parcels, pieces and tracts of land hereinafter in this section enumerated, for the improvement of Jackson street, and certain parts of certain other streets and avenues, all in the city of Seattle, under Ordinance No. 13,309, creating local improvement district No. 1,213, be, and the same hereby are, cancelled and annulled, to wit: . . . ."

It is manifest from the record that the passage of this ordinance was prompted by the result of certain litigation prosecuted by owners of certain property charged by the original assessment with a portion of the cost of the improvement, culminating in the decisions of this court in the cases of *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106, and *Seattle & Puget Sound Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093, where it was held that property which is found by the jury in a condemnation proceeding to be damaged is not chargeable by assessment with any of the cost of the

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improvement contemplated by such condemnation proceeding. Under these decisions, the assessments thus cancelled of record by this ordinance were invalid and unenforcible. It is also apparent from the record that the passage of this ordinance was intended as a preliminary step to the making of a reassessment, by "supplemental assessment" as the city called it, under the authority of the reassessment law, and the reassessment provisions of the city charter, which are in substance the same. Rem. & Bal. Code, § 7893 and following; City Charter, art. 8, § 18.

Thereafter, in December, 1910, the city council passed Ordinance No. 25,840 providing for a supplemental assessment against the benefited property within the district, to make up the deficiency caused by the invalidity of the assessments cancelled of record by Ordinance No. 24,827. An assessment roll was made up accordingly, omitting therefrom all charges against property which had been found to be damaged in the condemnation proceeding and against which the invalid cancelled assessments had been levied by the original assessment, and charging the deficiency caused thereby against other property in the district, including the property of these appellants which had already been assessed by the original assessment. Notice of hearing upon this supplemental assessment was given as the law directs, when these appellants filed their objections thereto, which were by the council overruled and the supplemental assessment roll confirmed in May, 1911, by Ordinance No. 27,259. Appeals were taken by the objectors, to the superior court, from that confirmation; and the decision of that court being adverse to them, they have appealed to this court. The original assessment, in so far as it was valid, was not disturbed or changed by the supplemental assessment; but the supplemental assessment was made in addition thereto. This seems to account for the city giving the new assessment that name rather than the name of "reassessment," as it is called in the law and charter provisions under which it was made. This, however, does not

change its legal effect, as we will presently see. Other facts will be noticed as may be found necessary in our discussion of the several contentions of appellants.

It is first contended by counsel for appellants that the supplemental assessment was erroneously made and confirmed because it resulted in the total of the original and supplemental assessment exceeding fifty per cent of the assessed value of the real estate, exclusive of improvements, within the improvement district, in violation of the limitation prescribed by Rem. & Bal. Code, § 7571, as follows:

“It shall be lawful for any city of the first class to order any improvement, the cost of which is to be charged to abutting property, when said cost shall not exceed fifty per cent of the valuation of the real estate exclusive of improvements within the proposed improvement district according to the valuation last placed upon it for purposes of general taxation.”

The city charter permits this limit to be exceeded under certain conditions; but we are not concerned with them here. The original estimated cost of the improvement was \$450,000. Fifty per cent of the total assessed value of the real estate within the district, as then defined by Ordinance No. 13,309, was \$452,000; and the total actual cost of the improvement, exclusive of interest, ultimately proved to be \$489,718; so it is apparent that both the estimated cost of the improvement and the ultimate actual cost of the improvement was less than fifty per cent of the assessed value of all the real estate within the district. The total amount charged against the property within the district by the original assessment was considerably in excess of fifty per cent of the assessed value of the real estate in the district. This evidently was the result of the accumulation of interest prior to the making of the assessment. However, the total amount assessed upon the original roll, against property in the district which was liable to assessment because of being benefited, was \$318,587, and the total amount of the supplemental assessment charged against benefited property in the district was \$61,409, mak-

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ing the total amount of the assessment, both original and supplemental, against property liable to assessment because of being benefited \$379,996; which, it will be noticed, is less than fifty per cent of the assessed value of all of the real estate in the district, less than the original estimated cost of the improvement, and less than the actual cost of the improvement. The difference between this sum and the actual cost of the improvement was made up partly by the city from its general funds; partly from assessments made upon property which had been damaged, and hence not assessable, by consent of the owners thereof; and partly by payments voluntarily made upon invalid assessments. It is apparent from the statute and charter provisions, above quoted, relating to the fifty per cent limit of assessment, that we are not here concerned simply with the question of how much the total cost of the improvement was; but, so far as the rights of the owners of property in the district are concerned, the question here is, What was the cost of the improvement in so far as that cost became chargeable as a lien by special assessment against the property within the district? If the city should undertake an improvement of an estimated cost of twice the fifty per cent limit of assessment upon property of the district, and should provide for payment of one-half or more of the cost of the improvement otherwise than by such special assessment, leaving only such portion of the cost to be assessed against property within the district as would be within the fifty per cent limit, we think that the owners of such property could not successfully maintain an objection to the assessment because of the cost of the improvement being beyond the fifty per cent limit; because the cost to them would not exceed that limit, and that, in our opinion, is the measure of the cost of the improvement so far as their rights are concerned. So in this case, we may exclude from consideration all sums having to do with the entire cost of the improvement except the total amount of the original assessment made upon property legally chargeable therewith and

the total amount of the supplemental assessment. If the total from these two sources does not exceed the fifty per cent limit, we are not able to see by what legal right complaint may be made upon this ground.

The question arises, What is the district for the purpose of determining the total assessed value of the real estate therein? Is it all of the real estate within the physical outer boundaries of the defined district, or is it only real estate within such boundaries, which may ultimately be legally assessed to pay the cost of the improvement? Learned counsel for appellants apparently contend that it is only the latter; and that this view would result in the total of the valid assessments in this case exceeding fifty per cent of the assessed value of the particular property so assessed. It seems to us that this view, in its final analysis, amounts simply to the contention that no particular lot or tract can be charged by the special assessment with more than fifty per cent of its assessed value. Now the district must be created and defined before making the improvement. At that time it is not known to what extent each particular tract in the district will be benefited. It is not known but that some of the tracts may not be benefited at all while others may be benefited even in excess of their entire assessed value. Manifestly these statutes and charter provisions do not constitute a limitation upon the amount which each tract may be charged by special assessment; but, like a general debt limit prescribed by constitution or statute against a municipality, refer to the total debt which may be incurred as compared with the total assessed value of the property in the entire district. It is simply a measure of the amount of the entire debt which may be incurred, and is not a measure of how much each particular tract or class of tracts may be charged in raising funds to pay such debt. This is the theory upon which this court decided the case of *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277, where there was in-



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volved the language of the city charter of Tacoma, reading as follows:

"No improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed."

This language, it will be noticed, comes nearer confining the district to the property that is ultimately actually assessed, and comes nearer limiting the assessment to fifty per cent of the assessed value of each particular tract, than does the language of the statute and other charter provisions here involved. It follows that the limit of the assessable cost of this improvement is fixed by the total assessed valuation of the real estate exclusive of improvement within the boundaries of the entire district, even though it be found in the making of the assessment that some of the property within the district cannot be assessed because it is not benefited, as occurred in this case. Applying this measure, we find that the total of these valid assessments, both original and supplemental, is well within the fifty per cent limit prescribed by the statute and charter applicable thereto. Of course the limit of actual benefit to each tract is paramount to all other limitations; but that is another question.

Some contention is made against the charging of the supplemental assessments against the property of these appellants because their property had already been charged for the improvement upon the original assessment roll. It seems clear, however, from the statute that the only valid objection to such additional charge made by supplemental assessment would be that such charge was not based upon proportional benefits; for except as restricted by law, Rem. & Bal. Code, § 7893, after authorizing reassessments, provides:

"And it is further provided, that whenever, for any cause, mistake or inadvertence the amount assessed shall not be sufficient to pay the cost of the improvement made and enjoyed by owners of property in the local assessment district where the same is made, that it shall be lawful and the city council or other authorized board or body is hereby directed and au-

thorized to make reassessments on all the property in said local assessment district sufficient to pay for such improvement."

Subdivision 10, § 18, art. 8, of the city charter is in substance the same. Clearly this authorizes such an additional charge, limited only by the benefit which the property has received from the improvements to be equitably apportioned. *State ex rel. Barber Asphalt Paving Co. v. Seattle*, 42 Wash. 370, 85 Pac. 11.

As we understand counsel for appellants, they also make some contention that the invalidity of the assessments which were cancelled by the city council has not been sufficiently shown to warrant a reassessment or supplemental assessment to make up the deficiency caused thereby. It is plain, however, from the record that such assessments were cancelled of record by the council because they were levied upon property which had been found to be damaged by the improvement in the condemnation proceedings. It is true that it does not appear that the litigation leading up to the decisions rendered by this court, above mentioned, wherein it is held that such property could not be assessed, directly involved each and all of the assessments so cancelled. But it is shown, at least *prima facie*—and appellants offered no showing to the contrary—that at least some of those assessments were directly involved in that litigation, and the result of that litigation established indirectly the illegality of all others of those assessments. It is not necessary that each particular assessment be directly adjudged invalid in an action wherein such assessment is called in question. The language of the reassessment law, Rem. & Bal. Code, § 7894, shows that it is sufficient for the purposes of a reassessment that the invalidity of the original assessment be established "either directly or by virtue of any decision" of the courts. It is not so much a question of whether or not an assessment has been actually adjudged invalid, but whether or not it is in fact invalid. Any decision that so shows is sufficient to support a

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reassessment. *State ex rel. Hemen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353; *Port Angeles v. Lauridsen*, 26 Wash. 153, 66 Pac. 403; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Johnson v. Seattle*, 53 Wash. 564, 102 Pac. 448.

It is further contended that the supplemental assessment was erroneously made and confirmed because all of the benefited property within the district was not charged with the assessment. This contention seems to be rested upon the assumption that the property which had been found in the condemnation proceeding to be damaged should have been assessed for the improvement because it was in fact benefited thereby; and evidence was offered in behalf of appellants to so show. While the court received some evidence so indicating, such evidence was apparently ignored by the court. In this it was clearly right, because the fact that such property was not benefited by the improvement was rendered final by the determination in the condemnation proceeding that it was damaged thereby. This is the theory upon which our decisions were rested in *Schuchard v. Seattle*, and *Seattle & Puget Sound Packing Co. v. Seattle*, *supra*.

It is finally contended that the evidence offered upon the trial shows that the supplemental assessments were not made according to benefits nor equitably apportioned upon the property charged. We have carefully read the evidence bearing upon this question, and deem it sufficient to say that we find nothing therein that would warrant our interference with the decisions of the council and the trial court upon that subject. There may be some room for difference of opinion as to the apportionment of the assessment and as to the amount of benefits conferred upon the several tracts; but we cannot say that any more serious question is presented by the evidence. This does not call for interference by us. Some other questions are raised in the brief of counsel for appellants; but whatever our views relative thereto might be, they would not call for a reversal of the trial court.

We conclude that the judgment must be affirmed. It is so ordered.

Crow and Gose, JJ., concur.

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[Nos. 10325-10336, 10294. Department One. August 16, 1912.]

INNER-CIRCLE PROPERTY COMPANY *et al.*, *Appellants*, v.  
THE CITY OF SEATTLE, *Respondent*.<sup>1</sup>

**MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—EXCEEDING ESTIMATES—EFFECT.** The fact that the actual cost of an improvement exceeds the original estimate does not affect the power of the city council to levy an assessment upon property to the extent of benefits received, within the limit allowed by law, where the estimate required by the charter was made by the board of public works to enable the council to act advisedly in ordering an improvement within the fifty per cent limit of the assessed valuations, and no notice to the property owners or hearing upon the amount of the estimate was required or given.

**SAME—REASSESSMENTS—WHEN AUTHORIZED—DEFICIENCY.** A reassessment to make up a deficiency is authorized where the city council cancelled the original assessment against property which had been adjudged to be damaged and therefore not assessable.

**SAME — REASSESSMENTS — CONFIRMATION — EFFECT — BURDEN OF PROOF ON APPEAL.** Where a city council has made a reassessment and the same has been confirmed, upon appeal to the superior court the burden is upon the appellants to show want of authority on the part of the council to make the reassessment, in view of Rem. & Bal. Code, § 7898, which provides that the decision of the city council on confirmation shall be a final determination of the regularity and validity of the reassessment; the presumption being that the council had authority to make the reassessment by reason of a deficiency in, or the invalidity of, the original assessment.

**SAME—PROPERTY SUBJECT TO ASSESSMENT.** Property found by the jury to be damaged by an improvement is not subject to an assessment for benefits.

**SAME—REASSESSMENTS—APPORTIONMENT.** Upon a reassessment, the question of the benefits and the apportionment thereof is an original question in no way controlled by the original assessment.

<sup>1</sup>Reported in 125 Pac. 970.

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**SAME—REASSESSMENTS—ASSESSMENT OF EXEMPT PROPERTY.** The fact that property which is exempt because not benefited was included in the original assessment, thereby creating a deficiency, does not affect the power to levy a reassessment on other property to make up the deficiency.

**SAME — REASSESSMENTS — PROPERTY DAMAGED.** An award of damages to a leasehold interest in state lands being an adjudication that the property was not benefited, exempts the same from a reassessment levied to make up a deficiency in the original assessment.

Appeals from judgments of the superior court for King county, Myers, J., entered January 10, 1912, confirming an assessment upon appeals from the city council. Affirmed in part and reversed in part.

*Ballinger, Battle, Hulbert & Shorts, Wm. Hickman Moore, Edwin C. Ewing, Higgins, Hall & Halverstadt, R. R. George, Wright & Kelleher, Wm. Martin, Tucker & Hyland, Geo. D. Emery, and Shank & Smith, for appellants.*

*Douglas, Lane & Douglas, for appellant Metropolitan Building Company.*

*James E. Bradford and William B. Allison, for respondent.*

PARKER, J.—These appeals are from judgments of the superior court for King county affirming the action of the city council of Seattle in making and confirming a supplemental assessment against property of appellants for the cost of a local street improvement. Except as to certain contentions made by appellant Metropolitan Building Company, our discussion and conclusions will apply to all alike.

In December, 1905, the city council of Seattle passed Ordinance No. 13,074 providing for widening, extending and changing the grades of Fourth avenue and other streets in the city, providing for the prosecution of condemnation proceedings to acquire and damage property rights as against the owners of abutting property and property through which certain of the proposed extensions were to be made, and providing for the levying of a special assessment by eminent do-

main commissioners against property benefited by such extensions and change of grades to pay the damages awarded by reason thereof, as authorized by the eminent domain law applicable to cities. While this ordinance did not make provision for the construction of the physical improvement, it manifestly contemplated the making of such improvement upon acquiring the right to take and damage property necessary therefor. Thereafter in November, 1906, the city council passed Ordinance No. 14,784 providing for the making of the physical improvement of the same streets as contemplated by Ordinance No. 13,074, creating a local improvement district and providing for the payment of cost of the improvement by special assessment against property within the district benefited thereby; such assessment to be levied by the city council in pursuance of the law applicable to local improvement assessments in the city. Thereafter an assessment was accordingly levied and confirmed by the city council in October, 1907, by Ordinance No. 17,186. Thereafter in December, 1910, the city council passed Ordinance No. 25,829 providing for the levying of a supplemental assessment against the property within the improvement district specially benefited by the improvement which had not been already assessed to the full amount of the benefits received by such property. Among recitals in the preamble of the supplemental assessment ordinance, it is stated that "there is a deficiency in the fund created to pay for the said improvement;" though it is not stated therein what caused the deficiency nor the amount thereof. Thereafter a supplemental assessment roll was made up and notice of hearing thereon given, when appellants filed their objections thereto, which objections were by the council heard and overruled and the supplemental assessment confirmed in May, 1911. This supplemental assessment was made under the reassessment provisions of the state law and city charter, which are in substance the same. Rem. & Bal. Code, § 7893 and following; City Charter, art. 8, § 18. The objectors having appealed

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from the decision of the council confirming the supplemental assessment to the superior court, and the judgment of that court being adverse to them, they have appealed to this court. Other facts may be noticed as may be necessary in discussing the several contentions made by appellants.

It is contended in behalf of appellant that since the actual cost of the improvement charged by special assessment against the property within the district exceeded the original estimated cost thereof, the supplemental assessment is void, at least to that extent. This contention is rested upon the decision of this court in *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768, where it was held in effect that, under the local assessment statutes applicable to cities of the third class, the original estimated cost of the improvement fixed the limit of the total amount chargeable by special assessment against the property within the district benefited thereby. A reading of that decision will show, however, that the conclusions there reached by the court were because of the special provisions of the statute relating to local improvement assessments in cities of the third class, Rem. & Bal. Code, §§ 7705, 7706, requiring such estimate to be made, notice thereof to be given to the property owners, and an opportunity for them to protest against the making of the proposed improvement, before it could be finally ordered by the council, and prohibiting the council from ordering such improvement over the protest of the property owners except upon certain conditions. No other hearing was afforded the property owners before the council as to the making of the improvement nor as to the regularity and correctness of the assessment levied by the council. The only recourse of the property owners under that statute was by an original action in the courts against the assessment, or in resisting the lien of the assessment when it is sought to be foreclosed in the courts. The holding that the estimate and notice thereof to the property owners was a necessary jurisdictional step, and that such estimate could not be exceeded by the assessment,

was because the statute in effect made it so. That statute has no application here. Seattle is a city of the first class, wherein local improvement assessments are governed by the provisions of other statutes and the charter of the city. The only requirement for a preliminary estimate of the cost of a local improvement in the city of Seattle which has come to our notice is that found in § 11, art. 8, of the City Charter, as follows:

“If the board of public works finds the facts set forth in said petition [for improvement] to be true, they shall cause an estimate of the cost and expense of such improvement to be made and transmit the same, together with all papers and information in their possession touching such improvement, with the estimated cost thereof, and their recommendations thereon, a description of the property which will be specially benefited thereby and a statement of the proportionate amount of the cost and expense of such improvement which shall be borne by such property, to the city council.”

No notice to the property owners of the amount of the estimate is required to be given; no provision is made for the council receiving protests from the property owners against the making of the improvement, nor for any hearing before the council upon that question. It is evident from the charter provisions that the estimate is to be furnished to the council simply to enable it to act advisedly in the ordering of the improvement, and especially to the end that it may be informed as to whether or not the cost of the proposed improvement will exceed fifty per cent of the assessed value of the property within the proposed local improvement district, that being the limit of special assessment prescribed by § 7571, Rem. & Bal. Code, and § 11, art. 8 of the city charter. The estimate is not made for the purpose of informing the property owners of the extreme possible cost of the improvement, and they are not given by statute or charter any hearing upon that question as a preliminary step to the ordering of the improvement, though they are later given ample opportunity to be heard upon the confirmation of the assessment roll



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relative to the question of benefits as well as all other questions going to the regularity and validity of the assessment. We are of the opinion that the fact that the actual cost of the improvement exceeded the original estimate does not affect the power of the council to levy either an original or supplemental assessment to the extent of the benefits conferred upon the property by the construction of the improvement, not exceeding, of course, the fifty per cent limit prescribed by the statute and charter.

Counsel for appellants make some contentions which seem to be rested upon the fact that the record made upon the trial in the superior court does not affirmatively show the cause of the deficiency in the funds to pay the cost of the improvement to be such as in law renders their property chargeable by supplemental assessment to make up such deficiency. The cause of the deficiency in this case is not shown by the record before us, except in so far as such cause is shown by the passage of three ordinances cancelling certain assessments upon the original assessment roll. One of these ordinances, cancelling original assessments amounting to \$12,543.13, contains recitals showing that such cancellations were because of the fact that the assessments so cancelled were void because they were against property which had been found and adjudged to be damaged by the improvement in the condemnation proceedings. This fact would render such assessments void and unenforcible under our decisions in *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *Seattle & Puget Sound Packing Co. v. Seattle*, 51 Wash. 49, 97 Pac. 1093, and *Hapgood v. Seattle*, ante p. 497, 125 Pac. 965. The other two ordinances cancelled original assessments amounting to \$20,669.42 without reciting any reasons therefor. So there was cancelled by these three ordinances, \$33,212.55 of the original assessments. As to how the balance of the deficiency represented by the supplemental assessment was caused, the record does not inform us. By the sup-

plemental assessment there was charged against private property within the district \$111,003.52, and against the general fund of the city \$36,903.81. So that the total deficiency was apparently \$147,907.33. So far as the \$12,543.13 of the original assessment cancelled because of being erroneously charged against damaged property is concerned, our decisions above cited settles the question of the invalidity of such assessments, and furnishes sufficient basis to authorize the supplemental assessment to that extent at least. So far as the balance of the supplemental assessment is concerned, we have in support thereof only the presumption that the city council had legal cause for making the same; that is, that there was such a deficiency as legally required a supplemental assessment to that amount, from the fact that the council made such assessment. Touching the effect and conclusiveness of the decision of the city council in confirming a reassessment, or supplemental assessment, as the city has called it in this case, Rem. & Bal. Code, § 7898, provides that, "their decision and order shall be a final determination of the regularity, validity and correctness of said reassessment, to the amount thereof, levied on each lot or parcel of land." And § 7902 provides for a direct appeal therefrom to the superior court by any property owner deeming himself aggrieved by the decision of the council. This, it seems to us, renders it clear that, upon appeal by objecting property owners from such decision of the council to the superior court, the burden is upon such appellant to show want of authority on the part of the council to make such reassessment, as well as the erroneous charge of the assessment against his property from any other cause, before he would be entitled to a reversal or modification of the council's decision in making and confirming the assessment. It will be noticed that the council's decision is not only declared by the statute to be a final determination of the regularity and correctness of the reassessment, but also of its validity. Manifestly, when the council has decided that such an assessment is legally neces-

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sary, as it of course does when it makes and confirms such an assessment, its decision, like that of any other tribunal having jurisdiction over the subject in controversy, is presumed to be legally correct until the contrary is affirmatively shown. We conclude, therefore, that, unless there is in this record something affirmatively showing that there was in fact no deficiency legally calling for the supplemental assessment for the amount levied, we must now presume that the deficiency did legally exist, as decided by the council, and that it was such as to support a supplemental assessment for that sum. Counsel for appellants call our attention to and place some reliance upon the decision in *Spokane v. Security Sav. Soc.*, 46 Wash. 150, 89 Pac. 466. There was not involved in that decision any question of the presumption of the regularity and validity of the reassessment. The facts upon which the validity of the original assessment rested were apparently conceded in that case, and the question was discussed by this court as though the facts affecting the validity of the original assessment and in turn that of the reassessment were all before the trial court. We have no such condition here. This record does not show that there were any facts before the trial court by which it could determine the validity of the original assessment or the cause of the deficiency, except as to the \$12,548.13 charged to damaged property; and hence, we are to presume that it had nothing before it to overcome the presumption of the correctness of the council's decision in making and confirming the supplemental assessment from which the appeal was taken to that court.

Now the only affirmative fact appearing in this record pointing to the lack of deficiency in the funds to the amount of the supplemental assessment requiring that assessment is the making and confirming of the original assessment. Counsel for appellants seem to rely upon the presumption of the validity of the original assessment as against the presumption of the validity of the later supplemental assessment. Of

course, until the making and confirmation, upon due notice of the latter, the presumption relied upon by appellants was in favor of the original assessment as between them and the city; but the making and confirming of the supplemental assessment was, in effect, a finding and decision by the council against the appellants upon that very question, and also upon the question of the necessity of the supplemental assessment. When the city council decided that there was a deficiency, whether by reason of invalid original assessments or from any other cause, as of course it did so decide by the making of the supplemental assessment, appellants were by notice given an opportunity to be heard upon all such questions. The council's decision upon such questions by the confirmation of the supplemental assessment was necessarily final unless appealed from, as the statute provides; otherwise the notice and hearing thereon provided by law would serve no purpose. The city was not required to assume the burden of showing the invalidity of the original assessment, nor any other cause of the deficiency upon the hearing of the appeal in the superior court. Appellants were there attacking the supplemental assessment, and had the burden of showing that the decision of the council in making and confirming it was erroneous. They could not secure a reversal of the council's decision in making a supplemental assessment by merely producing the record of the original assessment and relying upon such presumptions as were theretofore in its favor; nor was the city required to show upon the trial in the superior court the cause of the deficiency which prompted the making of the reassessment.

Another contention made in behalf of appellants which seems to us to be rested upon their erroneous view of the presumed regularity of the original assessment, is that the original assessment is a final adjudication upon the amount of the benefits conferred upon appellants' property and of the amount of benefits conferred upon property covered by the cancelled assessments; and that, therefore, no different or

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greater assessment can be placed upon their property than was placed upon it by the original assessment; and especially that no greater assessment can be placed upon their property because of any deficiency caused by want of reassessment upon property covered by the cancelled assessments. Such a view would practically defeat the power of reassessment. It is manifest from the provisions of the reassessment law that the question of benefits upon a reassessment or supplemental assessment is not controlled by the decision upon that question rendered in the making of the original assessment, any more than upon a new trial a decision upon the merits is controlled by a decision upon the merits rendered upon a former trial. In a reassessment proceeding, the questions of benefits and apportionment thereof are as much original questions as they are in the original assessment proceeding.

Our attention is called to *In re Sixth Avenue West*, 59 Wash. 41, 109 Pac. 1052, Ann. Cas. 1912 A. 1047, in support of the contention that assessments, which would be chargeable to exempt property but for its exemption, cannot be charged to other benefited property. Whatever may be said of that view when dealing with property which is by law entirely exempt from taxation and local assessments under all circumstances, we are to remember that we are not here dealing with such property. It is true that property which in the condemnation proceeding is found to be damaged by the improvement, is spoken of as being exempt from the assessment for the improvement; it is not, however, property which is by law exempt from assessment generally. In this case the so-called exempt property is not assessable, only because it *is not benefited*. Hence, it is not a case of making appellants' property bear the burden of such nonassessable property. So long as appellants' property is not assessed by the combined original and supplemental assessments more than it is benefited, and so long as such assessments are not inequitably apportioned, there is not legal cause for objecting to such assessments. Of course the fifty per cent limit cannot be

exceeded as against all the property within the district, but that question is not here involved.

Some other contentions are made by appellants, but we think they have been sufficiently disposed of in favor of the city by what has been said in the case of *Hapgood v. Seattle*, *supra*, except as to the appeal of the Metropolitan Building Company, which we will now notice. There is levied by this supplemental assessment a charge upon land held by the Metropolitan Building Company under a lease from the state of Washington, the land being a part of the old state university grounds. The record indicates that, at the time of the condemnation proceedings, this land was held by the Seattle Realty & Building Company under a lease from the state. Just what the nature of that lease was is not shown; but, in any event, the Seattle Realty & Building Company was awarded compensation in the condemnation proceedings on account of damage to this same land resulting from the change of the grades of the streets and the improvement of them accordingly. It is contended that this resulted in rendering the land, and all interests therein, free from liability to special assessment to pay for the improvement, upon the ground that the award of such damages was in effect an adjudication that the land was not benefited by the improvement. In the light of *Schuchard v. Seattle*; *Seattle & Puget Sound Packing Co. v. Seattle*, and *Hapgood v. Seattle*, above cited, we are constrained to hold that this contention must be upheld. If there could be no original assessment, because of no benefits, as it was in effect adjudicated in the condemnation proceeding, there would, of course, be no benefits to support a supplemental assessment to aid in paying for the same improvement.

We are of the opinion that the judgment of the superior court should be affirmed, except as to the charge made by the supplemental assessment against the land held by the Metropolitan Building Company under its lease from the state; and that, in so far as that charge is concerned, the judgment

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should be reversed, and that portion of the supplemental assessment set aside. It is so ordered.

Crow and Gose, JJ., concur.

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[No. 10136. Department One. August 17, 1912.]

JAMES N. GRIMES, *Respondent*, v. WILLIAM H. CATHCART,  
*Appellant*.<sup>1</sup>

HIGHWAYS—COLLISIONS BETWEEN VEHICLES—ACTIONS—QUESTIONS FOR JURY. In an action for personal injuries, the negligence of the defendant in driving into plaintiff's vehicle is for the jury, where defendant made no effort to check his speed and needlessly called for the plaintiff to get out of his way.

DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES. A verdict for \$2,000 for personal injuries sustained by a farmer fifty-six years of age in good health, will not be set aside as excessive, where he received internal injuries, confining him to the house for three months, and incapacitating him from work up to the time of the trial, ten months after receiving the injuries.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for personal injuries, it is not prejudicially erroneous to instruct that the jury may take into consideration "the age and condition in life" of the plaintiff, as referring to his financial condition, where there was no evidence of his financial worth.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered June 20, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for injuries sustained in a collision of vehicles. Affirmed.

*Hulbert & Husted*, for appellant.

*Robert McMurchie* and *M. J. McGuinness*, for respondent.

PARKER, J.—This is an action for the recovery of damages for personal injuries which the plaintiff claims resulted to him from the negligence of the defendant. From a verdict

<sup>1</sup>Reported in 125 Pac. 764.

and judgment in favor of the plaintiff, the defendant has appealed.

There was competent evidence given upon the trial tending to show, and sufficient to warrant the jury in believing, the following: In the neighborhood of the homes of appellant and respondent, in Snohomish county, there is a county road which winds down along the side of a steep hill. The roadway is improved about fifteen feet wide at the place where respondent's injuries occurred. At this point, the hill rises on one side of the road and descends upon the other, so that travel is there confined entirely to the improved portion of the road. On July 3, 1910, respondent was driving down this road with one horse hitched to a light buggy. Appellant was following him driving a horse hitched to a heavy milk wagon. Appellant came within view of respondent around a turn in the road at a distance of about 200 feet. Prior to reaching this point, appellant had been driving rapidly, even urging his horse into a run, according to the testimony of one witness. Upon coming to the turn where he could see respondent, appellant continued to drive rapidly down the hill without any effort to check his speed until within a very short distance of the rear of respondent's buggy. As he came to the turn in view of the respondent, he made remarks accompanied by profanity, indicating his intention to proceed recklessly on his course. Upon arriving within fifty feet of respondent, he called to him to get out of his way, and about the same time attempted to check his horse. About this time, a neighbor who was riding with appellant applied the brake on his wagon, which seemed to give way or for some cause refused to work. Respondent, made an effort to get out of the way by turning close to the hillside, but the left shoulder of appellant's horse struck the rear right wheel of the buggy, throwing his horse to the ground and getting his feet entangled in the spokes of the wheel of the buggy, injuring the buggy to some extent though not entirely upsetting it. Just as the horse struck the buggy, respondent,



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seeing the impending danger, was proceeding to get out of his buggy, when the shock of the collision threw him to the ground and against one of the wheels of the buggy, causing the injuries for which he now seeks recovery. Respondent's injuries were internal, and did not become manifest until some little time later while he was driving home, when he became sick and dizzy. His injuries caused him to be confined to his house for two or three months thereafter, and he had been practically entirely disabled from his work up to the time of the trial, which occurred ten months after he was injured. He was attended by a physician, and incurred considerable expense on that account. He is a farmer, fifty-six years old, and was, previous to being injured, in good health and fully able to perform his usual farm work. The jury awarded him \$2,000 on account of the injuries received.

It is contended that appellant was entitled to judgment notwithstanding the verdict, or in any event to a new trial, upon the ground of the insufficiency of the evidence to render him liable for respondent's injuries. The theory of this contention is that respondent was injured while getting out of his buggy after the collision, and after his buggy had come to rest, and that he was not, therefore, injured by any act of appellant. The answer to this contention is that the testimony was conflicting upon this question, and it was therefore for the jury to decide. There was competent evidence, as we have already noticed, to warrant the jury in believing that the shock of the collision threw respondent from his buggy while he was attempting to get out and escape the apparent impending danger, and there was ample evidence to support the conclusion that the collision was the direct result of appellant's negligent and reckless driving.

It is also contended that the verdict was excessive in amount, and that the respondent should be required to accept a less amount or submit to a new trial. We are satisfied, however, that in view of the nature and extent of respondent's injuries, the amount of the verdict does not suggest such

passion or prejudice on the part of the jury as to call for our interference on that ground. It is true that the extent of respondent's injuries had to be determined by the jury largely upon his own testimony, and his complaints made to his physician from time to time as to his pain and suffering; since his injuries were of that nature which physicians designate as subjective rather than objective; that is, they were not such as could be seen by the physician. An examination made of respondent by other physicians at the time of the trial, according to their testimony, indicates that his health was not then seriously impaired; but, in its last analysis, the nature and extent of respondent's injuries was only a question of fact upon which the evidence was conflicting, and it was therefore for the jury and not the court to decide.

It is contended that the trial court erred in refusing to give certain requested instructions upon the theory of respondent's contributory negligence in not exercising due care to avoid the collision. We find no evidence in the record pointing to any want of care on the part of respondent. It follows that the question of his contributory negligence was not a question for submission to the jury, and therefore of course no instruction was required thereon.

In its instruction to the jury upon the elements of damage which they might take into consideration, the court instructed the jury, among other things, that they might "take into consideration his age and condition in life . . ." This, it is contended, was prejudicially erroneous. Counsel for appellant construe this language as referring to the financial worth of respondent. If that were the meaning of the words "condition in life," as used in the instruction, it would be subject to criticism. For of course that would not be a proper subject of inquiry in such a case. We think, however, that the language as used in the instruction would not convey to the mind of an ordinary juror any such meaning, in view of the fact that the evidence is silent as to the financial worth of respondent. We think the jury was not led to regard the ex-

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pression as having any reference to anything more than respondent's age, physical condition, earning capacity, etc. The Missouri courts have declined to reverse judgments on the ground of the use of similar expressions in instructions to juries by trial courts. *Ross v. Kansas City*, 48 Mo. App. 440, 447, and cases cited. While it would have been better for the court to have omitted from its instructions the words "condition in life," we think their use under the circumstances was not prejudicially erroneous. Other assigned errors we think are wholly without merit, and do not call for discussion.

The judgment is affirmed.

MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.

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[No. 9973. Department One. August 19, 1912.]

THE STATE OF WASHINGTON, *on the Relation of Spokane,  
Portland and Seattle Railway Company, Appellant, v.  
RAILROAD COMMISSION OF WASHINGTON et al.,  
Respondents.*<sup>1</sup>

RAILROADS—REGULATION—NAME OF STATIONS—RAILROAD COMMISSION. An order of the railroad commission requiring a railroad to designate the name of a station in its tariffs, folders, and tickets as Bingen and White Salmon is unreasonable, where it appears that its station, in the village of Bingen of 100 inhabitants, is but one and one-half miles from the business center of the town of White Salmon, having a population of 800 or more, the latter being the more appropriate name for the district, and the railroad company having recently changed the name of its station from Bingen to White Salmon in deference to the wishes of a majority of the patrons of the station; since the naming of its stations will not be interfered with in the absence of any public necessity therefor.

Appeal from a judgment of the superior court for Klickitat county, McKinney, J., entered September 9, 1911, af-

<sup>1</sup>Reported in 125 Pac. 953.

firming an order of the railroad commission respecting the published list of railway stations. Reversed.

*Carey & Kerr and Charles A. Hart*, for appellant.

*W. V. Tanner and Stephen V. Carey*, for respondents.

PARKER, J.—This is an appeal from a decision of the superior court for Klickitat county, affirming an order of the state railroad commission which, so far as it requires our notice here, directs that appellant “show on all tariffs and folders the station of Bingen and that the name be shown, not by a star and foot note, but that it be shown among the list of stations, and that the name of ‘Bingen and White Salmon’ or ‘White Salmon and Bingen’ be bracketed and shown as the same station; that when tickets are sold to passengers desiring a ticket to Bingen, the ticket shall bear the name of Bingen thereon in connection with the name of White Salmon.”

It is contended by counsel for appellant railway that this order is unreasonable, in the light of evidence produced before the commission upon which it is based; and in view of our conclusions upon that question, it will be unnecessary for us to discuss other contentions made by counsel.

The controlling facts as shown by the evidence introduced before the commission, may be summarized as follows: In July, 1908, appellant railroad company changed the name of its station on the line of its railway in Klickitat county, theretofore called Bingen, to White Salmon. This change was apparently made in compliance with the wishes of a large majority of the patrons of the railway company having business with it at that station. The station is situated upon the platted townsite of Bingen, not far from the business center of that town, where there is a post office of the same name. Bingen is not an incorporated town, but a mere village, and has only about 100 inhabitants. The name has no application except to the town or village itself. It is not suggestive of any surrounding country or valley, as is that

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of White Salmon. About a mile and a half from the station, is situated the business center of the town of White Salmon, which is an incorporated town of the fourth class, having a post office of the same name and a population of 800 or more. The name White Salmon has a well recognized application to a somewhat extensive scope of country lying in the valley of the White Salmon river, and tributary to the town of White Salmon. This tributary valley and country has a population, together with the town of White Salmon, of from 3,500 to 4,000 people. The country tributary to Bingen is very small, both in extent and population. About ninety per cent of the business of the railway company at this station is with the people of the town of White Salmon and the White Salmon country; about sixty per cent of it being with the town of White Salmon, the other ten per cent being with the people of Bingen and its tributary territory.

It seems to us that argument is hardly necessary to show the appropriateness of the name of White Salmon for this station, though it may be conceded that Bingen is not an inappropriate name therefor. The closer proximity of the station to the business center of Bingen than to that of White Salmon is the only argument worthy of notice in favor of the name of Bingen in preference to White Salmon. When we consider the very short distance of the town of White Salmon from the station, the excess of the business of that town and its tributary territory with the railway company over that of Bingen, and the well recognized application of the name "White Salmon" to both the territory and town, the facts shown seem to argue much more in favor of the appropriateness of the name of White Salmon than that of Bingen. Now it can not be seriously argued that the railway company has not the right to choose and use names for its stations without interference therewith by the commission, except it be in cases where a name so chosen and used materially detracts from the efficiency of the service which the railway company is required to furnish to the public. We are quite unable to

side lines of such assessment district shall in no event be distant more than 150 feet from the nearest side line of the street, avenue, public way or alley improved . . . .” The italicized words indicate the changes made by the amendment. By the original charter provision, both the end lines and side lines of the assessment district must be coterminous with the portion of the street improved longitudinally, and the side lines not more than 150 feet distant from the nearest line of the street improved.

The language of the amendment is by no means free from ambiguity, but we find in it no warrant for holding that the city was authorized to extend the side lines of the district beyond the 150-foot limit. The amendment fixes definitely end lines for the district, and then provides by implication that these lines may be changed or extended by ordinance. What the phrase, *in such cases*, relates to is uncertain, to say the least. Grammatically speaking, it must relate to something that precedes it. If it relates to districts which must be coterminous with the street improved, there is no limitation where the city has otherwise provided by ordinance; if it relates to districts where the city has otherwise provided by ordinance, there is no limitation where such provision has not been made; and if it relates to districts of both kinds, the city's contention falls to the ground. But, whatever the intention of the framers of the amendment may have been, they have failed to use language sufficiently definite and explicit to remove the 150-foot side limit to assessment districts imposed by the original charter provisions; and the judgment is accordingly reversed, with directions to overrule the demurrer and take such proceedings as are not inconsistent with this opinion.

CROW, ELLIS, PARKER, and GOSE, JJ., concur.

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[No. 9873. Department One. August 19, 1912.]

WILLIAM MILLER, *Respondent*, v. COMMERCIAL UNION  
ASSURANCE COMPANY, LIMITED, *Appellant*.<sup>1</sup>

PLEADING — INCONSISTENT PLEADINGS — CORRECTION. Where it is manifest from the whole record that the defendant only desired to have an offset, which had been inconsistently pleaded as a counter-claim in a cross-complaint, defendant should be allowed to correct the pleading by dismissing the cross-complaint.

INSURANCE — AUTOMOBILE POLICY — MISREPRESENTATIONS — WARRANTIES — EFFECT. In an application for an automobile policy, statements that it was a new machine and not second hand and had cost a specified sum, are warranties and not representations, where the parties have stipulated in the policy that the statements are material and if untrue shall avoid the policy; and being affirmative and not promissory warranties, no recovery can be had on the policy where the statements were untrue.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 5, 1911, upon findings in favor of the plaintiff, in an action upon a policy of fire insurance, after a trial on the merits to the court. Reversed.

*Post, Avery & Higgins*, for appellant.

*Curtiss & Remele*, for respondent.

CROW, J.—This action was commenced by William Miller against Commercial Union Assurance Company, Limited, a corporation, to recover upon a fire insurance policy issued on an automobile owned by the plaintiff. The trial judge made findings upon which judgment in plaintiff's favor was entered. The defendant has appealed.

The policy was issued on June 25, 1910, and the automobile was destroyed by fire on July 5, 1910. Respondent made a written application, material portions of which read as follows:

<sup>1</sup>Reported in 125 Pac. 782.

side lines of such assessment district shall in no event be distant more than 150 feet from the nearest side line of the street, avenue, public way or alley improved . . . .” The italicized words indicate the changes made by the amendment. By the original charter provision, both the end lines and side lines of the assessment district must be coterminous with the portion of the street improved longitudinally, and the side lines not more than 150 feet distant from the nearest line of the street improved.

The language of the amendment is by no means free from ambiguity, but we find in it no warrant for holding that the city was authorized to extend the side lines of the district beyond the 150-foot limit. The amendment fixes definitely end lines for the district, and then provides by implication that these lines may be changed or extended by ordinance. What the phrase, *in such cases*, relates to is uncertain, to say the least. Grammatically speaking, it must relate to something that precedes it. If it relates to districts which must be coterminous with the street improved, there is no limitation where the city has otherwise provided by ordinance; if it relates to districts where the city has otherwise provided by ordinance, there is no limitation where such provision has not been made; and if it relates to districts of both kinds, the city's contention falls to the ground. But, whatever the intention of the framers of the amendment may have been, they have failed to use language sufficiently definite and explicit to remove the 150-foot side limit to assessment districts imposed by the original charter provisions; and the judgment is accordingly reversed, with directions to overrule the demurrer and take such proceedings as are not inconsistent with this opinion.

CROW, ELLIS, PARKER, and GOSE, JJ., concur.



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INSURANCE — AUTOMOBILE POLICY — MISREPRESENTATIONS — WARRANTIES — EFFECT. In an application for an automobile policy, statements that it was a new machine and not second hand and had cost a specified sum, are warranties and not representations, where the parties have stipulated in the policy that the statements are material and if untrue shall avoid the policy; and being affirmative and not promissory warranties, no recovery can be had on the policy where the statements were untrue.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered June 5, 1911, upon findings in favor of the plaintiff, in an action upon a policy of fire insurance, after a trial on the merits to the court. Reversed.

*Post, Avery & Higgins*, for appellant.

*Curtiss & Remele*, for respondent.

CROW, J.—This action was commenced by William Miller against Commercial Union Assurance Company, Limited, a corporation, to recover upon a fire insurance policy issued on an automobile owned by the plaintiff. The trial judge made findings upon which judgment in plaintiff's favor was entered. The defendant has appealed.

The policy was issued on June 25, 1910, and the automobile was destroyed by fire on July 5, 1910. Respondent made a written application, material portions of which read as follows:

<sup>1</sup>Reported in 125 Pac. 782.

"To Commercial Union Assurance Company, Limited, . . .

"Insurance is wanted by Wm. Miller for the term of one year from June 25th, 1910, at noon, until June 25th, 1911, at noon, for the sum of \$2,000 upon the body, machinery and equipment of the automobile hereinafter described, which description is hereby made a warranty by the applicant . . .

"Particulars and Description of Automobile. . . .

"Original cost to applicant, including equipment, \$4,300.

"Present value of automobile, \$2,600. . . .

"State whether automobile was new or second hand when purchased by applicant. New.

"If second hand, state when purchased and give name and address of party from whom purchased. . . .

"State whether the automobile is fully paid for. Yes.

"State whether it is mortgaged or encumbered. No. . .

"Dated at Spokane, Wash., 6-25, 1910.

"Wm. Miller, Applicant."

Endorsed on the application, under the heading "Conditions of Policy," was the following stipulation, which was also contained in the policy:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the automobile be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss."

The policy recited that:

"Commercial Union Assurance Company, Limited, of London, England.

"In consideration of fifty and no-100 dollars, to it agreed to be paid by the insured hereinafter named, and of the statements made in the application for this insurance, which is hereby made a warranty and a part of this policy. Does insure Wm. Miller, for the term of one year from the twenty-fifth day of June, 1910, at noon, to the twenty-fifth day of June, 1911, at noon, against loss or damage to the automobile hereinafter described, its body, machinery and equipment, while attached to and forming a part of said automo-

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bile. To an amount not exceeding two thousand and no-100 dollars. . . .”

Respondent pleaded the issuance of the policy, payment of the premium, the destruction of the automobile by fire, respondent's compliance with all terms and conditions of the policy, and appellant's refusal to pay. In its answer appellant alleged that the statements of the application became and were a part of the policy; that they were untrue in that the automobile was not new when purchased by respondent; that he was not its owner when the application was made; and that it was not free from incumbrance; all of which was unknown to appellant but was known to respondent. For a counterclaim and cross-complaint, the appellant pleaded the issuance of the policy; that the premium had not been paid, and asked judgment therefor. In his reply, respondent admitted that he made the written application; that its statements became and were a part of the policy; and that the automobile was not new when purchased by him; but alleged that appellant inspected the machine and knew its condition; that respondent's statements were not material to the risk; that appellant was not deceived; and that, although respondent at the time of making the application, owed his vendor \$150 on purchase price, the machine had then been delivered to respondent, and no lien existed thereon. Replying to the cross-complaint, respondent admitted that he was indebted to appellant for the premium, and alleged that at the time of the preparation of the complaint, which was verified by one of his attorneys, he was not within the state of Washington, and that his attorneys by mistake alleged the premium had been paid.

After the issues were completed, appellant moved for judgment on the pleadings for the premium and costs. Respondent filed an offer to confess the motion, provided the premium should be applied in reduction of his claim. Thereupon appellant moved the court for an order permitting it to amend its motion for judgment to read as follows:

"Comes now the defendant in the above entitled cause and moves the court for an order for a judgment on the pleadings that plaintiff take nothing herein and that defendant have judgment for its costs."

Upon hearing, all of the motions were denied by Honorable E. H. Sullivan, one of the judges of the superior court. Thereafter the action was called for trial, without a jury, before Honorable J. D. Hinkle, another judge of the same court. Before any other proceedings were had, appellant's attorney made the following statement and request:

"There is a thing in this case that your Honor probably is not in a position to appreciate at this time. In all these pleadings you will observe that Mr. Curtiss [counsel for respondent] consents that we take judgment for forty dollars in this case, and we made a motion for judgment on the pleadings. That was before Judge Sullivan. During that argument we made a subsequent motion asking that the case be dismissed, although asking for the forty dollars. That is a matter of record here. Judge Sullivan, on account of the arguments that were made, probably took the view, or expressed himself at the time when that second motion was called to his attention, that that amended the counterclaim to be in the alternative. Now, if there is any doubt in your Honor's mind about that—I have been acting on Judge Sullivan's opinion—if your Honor has any doubt about that, I will make a motion dismissing that counterclaim. . . . In our cross-complaint we ask for forty dollars due on the policy. We want the case dismissed or else we want the forty dollars. In other words, we cannot claim there is forty dollars due us, and at the same time say the policy is void."

Upon objection of respondent's counsel, this request to dismiss the counterclaim was denied, and the trial proceeded upon the pleadings as drawn. The trial judge found the amount of respondent's loss, deducted the premium therefrom, and entered judgment for the remainder.

Appellant contends that the policy was void by reason of the untruthful statements of respondent's application; that the statements were warranties which became a part of the policy; and that the trial court erred in not dismissing the

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action. Respondent insists that the representations or warranties were immaterial; that the appellant cannot by its answer declare the policy void for the purpose of defeating a recovery, and at the same time declare it valid for the purpose of collecting the premium; and that appellant has estopped itself from attacking the validity of the policy by seeking a recovery of the premium.

It is apparent that the allegation of the complaint that the premium had been paid, when in fact, as respondent admits, it had not been paid, induced appellant to plead its nonpayment. It is further manifest, from the entire record, including appellant's attempted correction of its motion and its offer to dismiss the cross-complaint, that appellant only desired to have the unpaid premium deducted from any judgment in respondent's favor, should the court sustain the policy. If appellant had collected the premium, and without tendering or returning it to respondent had attempted to avoid the policy, a different question would be presented. Respondent has in no manner been misled, as he has not paid the premium. While appellant's pleadings may be somewhat inconsistent, it is nevertheless apparent that it is not declaring the policy void for the purpose of preventing respondent's recovery, while asserting its validity for the purpose of collecting the premium. The trial court should have granted the motion to dismiss the cross-complaint. Appellant, without collecting the premium, denied its liability at all times prior to the commencement of this action. If the policy was void when the action was commenced, no contract then existed, and we cannot now hold that a new contract created by estoppel has since come into existence. Authorities cited by respondent in support of his contention are cases in which premiums had been collected from the assured, and in which the insurer questioned the validity of the policies while retaining the premiums and without refunding the same. No such facts appear in this action.

The controlling question on this appeal is whether the policy was void by reason of untruthful statements contained in respondent's application. It is undisputed that his statements that the auto was new when purchased by him, that it was not a second-hand machine, and that it had cost him \$4,300 were all untrue. There was disputed evidence tending to show that other statements were untrue. Ordinarily a misrepresentation of the assured will not affect the validity of a policy unless it is material to the risk or, by the terms of the application and policy, has become an affirmative warranty. When the parties by the terms of their contract expressly stipulate that a representation shall be regarded as material, it ceases to be a representation only, and becomes a warranty.

"Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract, while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself. Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss." 19 Cyc. 683, and cases cited.

When a policy is issued on the faith of representations of the assured as to existing facts, such representations become warranties, with the result that, if they be not strictly true as made, the policy, without regard to their materiality, will not take effect. The parties, having agreed upon the materiality of the statements warranted, are thereafter precluded from questioning their materiality. In *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 103, 107 Pac. 866, this court said:

"The rule is that, when a representation made by an applicant for insurance is carried into a contract and expressly made a part of it, it becomes a warranty, and its materiality

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is settled by the agreement of the parties. Elliott, Insurance, § 102; *White v. Provident Sav. Life Assur. Soc.*, 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427. The difference in legal effect between a warranty and a representation is that the falsity in a warranty in any particular is fatal to a recovery upon the policy, whilst a representation to have that effect must refer to some fact material to the insurance, and it must be false or fraudulent. *Weigle v. Cascade Fire & Marine Ins. Co.*, 12 Wash. 449, 41 Pac. 53; Elliott, Insurance, § 114."

In *Poultry Producers' Union v. Williams*, 58 Wash. 64, 66, 107 Pac. 1040, 137 Am. St. 1041, we said:

"A warranty must be strictly true. *Rice v. Fidelity & Deposit Co.*, 103 Fed. 427. A representation need only be substantially true. *Missouri K. & T. Trust Co. v. German Nat. Bank*, 77 Fed. 117. 'The crucial distinction between a representation and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate.' *Rice v. Fidelity & Deposit Co.*, *supra*."

Respondent contended, and the trial court held, that the representations contained in the application, which became warranties by agreement of the parties, were not material to the risk; that they in no way contributed to or caused the loss; and that they should not avoid the policy. The difficulty with this conclusion is that it ignores the fact that the parties have contracted and agreed that the representations *shall be material*, and that if untrue they *shall avoid the policy*.

"One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction; no latitude; no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done; it must be literally performed." 1 May, Insurance (4th ed.), § 156.

Warranties are of two kinds, affirmative and promissory. The former relate to and warrant the present or past existence of particular facts, upon the exact truth of which the inception of the contract of insurance depends; and if untrue will avoid the policy. The latter, which are of an executory character, warrant that something shall be done or omitted after the policy takes effect and during its continuance, and will avoid the contract if the thing to be done or omitted be not done or omitted as warranted. 1 May, Insurance (4th ed.), § 157; 19 Cyc. 708; *Algase Co. v. Corporation of The Royal Exchange Assurance*, 68 Wash. 178, 122 Pac. 986.

If the warranties now under consideration were of a promissory character, such as the warranty before this court in *Port Blakely Mill Co. v. Springfield Fire and Marine Ins. Co.*, 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593, a case cited by respondent, a different question would be presented; but they are affirmative and not of a character to which the rule announced in the *Port Blakely Mill Co.* case may be applied. The evidence shows that the representations or affirmative warranties were untrue, and that respondent knew they were untrue. The policy did not take effect, and cannot be enforced.

Respondent contends, (1) that the application was prepared by appellant's authorized agent, and (2) that appellant inspected the auto before issuing the policy. Without quoting the evidence, we state our conclusion that it fails to sustain either of these contentions.

The judgment is reversed, and the cause remanded with instructions to dismiss.

CHADWICK, GOSE, and PARKER, JJ., concur.



[No. 10568. Department One. August 19, 1912.]

CONSOLIDATED SCHOOL DISTRICT No. 105, SNOHOMISH  
COUNTY *et al.*, Respondents, v. LIZZIE JONES, as  
*Superintendent of Schools of Snohomish*  
*County, Appellant.*<sup>1</sup>

SCHOOLS AND SCHOOL DISTRICTS—SCHOOL SUPERINTENDENTS—  
POWERS—CONSOLIDATION OF DISTRICTS. In the absence of statutory  
authority, the county school superintendent has no power to dissolve  
a consolidated school district, whether the consolidation was legal  
or illegal.

Appeal from a judgment of the superior court for Sno-  
homish county, Bell, J., entered July 13, 1912, granting an  
injunction as prayed for upon overruling a demurrer to the  
complaint. Affirmed.

*Ralph C. Bell*, for appellant.

CHADWICK, J.—On the 20th day of July, 1910, School  
District No. 20 of Snohomish county, forming with other dis-  
tricts Union High School District No. 103, consolidated with  
School District No. 30 of the same county, which formed  
with the other districts Union High School District No. 100.  
The consolidated districts are known as Consolidated School  
District No. 105. The defendant, as county superintend-  
ent, has threatened to dissolve the consolidated district, for  
the reason that the two districts were consolidated without  
warrant or authority of law, and the present action was in-  
stituted by the board of directors of the consolidated dis-  
trict to enjoin such threatened action on her part. A de-  
murrer to the complaint was overruled, and the defendant  
electing to stand on her demurrer and refusing to plead  
over, final judgment was entered, granting a permanent in-  
junction as prayed. From this judgment, the defendant has  
appealed, and by stipulation the appeal is submitted to this

<sup>1</sup>Reported in 125 Pac. 767.

court on a transcript of the record and the appellant's brief.

The question sought to be raised by the appeal is the right of two school districts, lying in different union high school districts, to consolidate under the law permitting consolidation in certain cases, but we do not think that appellant can raise that question. The two districts have been, in fact, consolidated, and we are cited to no provision of the law authorizing the county school superintendent to dissolve a consolidated district, whether the consolidation be legal or illegal. In the absence of a statute conferring such power on the superintendent, the district can only be dissolved by an order of a court of competent jurisdiction in a *quo warranto* or other appropriate proceeding.

Without expressing any opinion on the merits of the question thus presented, the judgment must therefore be affirmed, and it is so ordered.

GOSE, PARKER, and CROW, JJ., concur.

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[No. 10272. Department One. August 20, 1912.]

THE CITY OF TACOMA, *Respondent*, v. H. H. BROWN *et al.*,  
*Appellants*.<sup>1</sup>

EMINENT DOMAIN—STREETS—PUBLIC NECESSITY—DETERMINATION BY CITY COUNCIL—REVIEW. The determination by the city council of the necessity for extending or widening streets being conclusive on the courts, no prejudice results from an *ex parte* order of court declaring the necessity, or from an order striking answers setting up a lack of public necessity, the city council having determined the question.

SAME—PUBLIC NECESSITY—USE BY RAILROAD. The widening of a street to be given over in part to a railway company is a public use, and will not be reviewed by the courts in the absence of positive fraud.

SAME—DAMAGES—VERDICT—REVIEW. The supreme court will not substitute its judgment for that of the jury as to the damages

<sup>1</sup>Reported in 125 Pac. 940.

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awarded in condemnation, especially where the jury viewed the property.

APPEAL—REVIEW—OBJECTIONS WAIVED. Objections to the form of the verdict cannot be urged on appeal where counsel waived the same below when the verdict was received.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 2, 1912, upon the verdict of a jury awarding damages for property condemned. Affirmed.

*L. C. Whitney and Browder D. Brown*, for appellants.

*T. L. Stiles, F. R. Baker, and F. M. Carnahan*, for respondent.

CHADWICK, J.—This is an appeal from an award of damages for the taking of certain property by the city of Tacoma. Two questions are raised on this appeal. The one is that the property so taken is not taken for a public use, and that the parties appellant have been deprived of an opportunity for a hearing upon that question; the other, that the damages are insufficient to compensate appellants, and that the form of the verdict does not conform to the statutory requirements. The necessity for the taking of appellants' property was declared by ordinance, and thereafter a petition was filed in the superior court asking that the court declare a public necessity and that it thereupon call a jury to assess damages.

We take it that this proceeding was instituted under the Laws of 1907, ch. 153, page 316 (Rem. & Bal. Code, § 7768 *et seq.*). If this be so, appellants have not been deprived of any right recognized or guaranteed by law because, as it is contended, the order of necessity was made by the court at a time when they were not present and a motion to make more definite and certain was pending. Nor were they prejudiced by the fact that the court upon motion struck their answers setting up a lack of public necessity; for the law is that, if the city has jurisdiction to extend or widen its streets for any

purpose, the determination of the question of public necessity by the municipal officers is conclusive upon the courts, in the absence of fraud. This rule has been laid down in many cases, all of which are collected and referred to in *Tacoma v. Titlow*, 58 Wash. 217, 101 Pac. 827. We cannot, therefore, review either the will of the council in passing the ordinance under which the work was to be done, or the judgment of the court in holding the use to be public.

It is insisted that the purpose of the city is not to serve the convenience of travel, but rather to so widen the street as to permit a railway company having a franchise thereon to double its tracks. While we doubt whether this question is properly before us, it would not follow that it would be a fraud upon the rights of the property owner if it were so. Streets in cities must of necessity be given over at times to the use of railways and transportation companies. Such use is itself a public use, and this court has held that the necessity for giving over a part of the public streets to railway companies is not, because of that reason alone, a fraud upon the property owner; and the act of the council will not be reviewed or called in question in the absence of positive fraud, when so made by the courts. *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

The only question remaining is the amount and distribution of the damages. This court has uniformly held that it will not substitute its judgment for that of the jury as to the amount of damages; especially so, when there was a view of the property. *In re Mercer Street*, 55 Wash. 116, 104 Pac. 133. As to the distribution of the award, the verdict was not in proper form; but upon a statement by the foreman of the jury that the award was intended to cover all damages suffered by the appellants, their counsel stated that no question as to the form of the verdict would be made. Whereupon the trial judge announced that he would not send the jury back to correct their verdict. Appellants are not, therefore, in position to question the verdict.

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We find no error in the record, and the judgment of the lower court is affirmed.

PARKER, CROW, and GOSE, JJ., concur.

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[No. 10432. Department One. August 20, 1912.]

CHARLES E. CLEVELAND, *Respondent*, v. MALDEN WATER WORKS COMPANY, *Appellant*.<sup>1</sup>

WATERS AND WATER COURSES—WATER COMPANIES—FRANCHISE—SERVICE TO CONSUMERS—COST OF CONNECTIONS. Under a franchise ordinance authorizing a water company to lay its pipes in streets and requiring it to furnish water to consumers at a certain fixed monthly rate, the company must deliver the water to the consumer at his property line, and must therefore defray the expense of extending the line from the main to the property line.

Appeal from a judgment of the superior court for Whitman county, Neill, J., entered October 17, 1911, upon findings in favor of the plaintiff, granting a writ of mandamus requiring a water company to supply water. Affirmed.

*Wakefield & Witherspoon* (A. C. Shaw and E. P. Twohy, of counsel), for appellant.

*J. N. Pickrell* (J. M. McCroskey and R. M. Burgunder, of counsel), for respondent.

CHADWICK, J.—The material facts in this case are as follows: The plaintiff, Cleveland, is the owner of a lot abutting on Ninth street in the town of Malden in Whitman county. The defendant water company is a public service corporation, owning and operating a water system along Ninth street and other streets of the town, under a franchise from the town council. Sections 1, 2, 3 and 4, of Ordinance No. 8, granting the franchise, read as follows:

“Section 1. That the Malden Water Works Company, a corporation existing under the laws of this state, its successors or assigns, be and is hereby granted the right and

<sup>1</sup>Reported in 125 Pac. 769.

privilege of excavating and laying pipes and mains in the public streets and alleys of said town for the purpose of furnishing to its inhabitants fresh water for domestic and sewerage purposes and for fire protection and otherwise as may be designated by proper ordinance for a period of twenty-five years from the granting and acceptance of this ordinance.

"Section 2. The said corporation shall lay such pipes and place hydrants as directed by the street committee or such other committee of said town as may be charged with the duties of looking after the streets and alleys, provided that a sufficient number of persons on the streets to be benefited by said extensions shall first petition and sign contracts with the company guaranteeing twelve per cent net on the estimated cost of said extension, which said pipes and mains shall be of sufficient size and of quality to furnish ample and sufficient water for all purposes intended and to be placed and extended for consumer's use, and commence the laying of same within such time as designated by resolution of the council and directions of the said street committee.

"Section 3. That it shall have the right to make the necessary excavations for the laying, maintaining and repairing of said pipes, mains and hydrants, but must without unnecessary delay refill all ditches and place the street and grounds in safe and proper condition, and for the failure so to do immediately after being directed by the street committee, they may cause the same to be done at the expense of the said corporation and charge the same up as a tax against said plant.

"Section 4. That said corporation may charge and collect such tolls for the furnishing of water to users and consumers as shall be considered reasonable and just to give them fair return on the investment, which price may be changed and revised at periods of five years after the first ten year period, if so requested by resolution of the council and for a period of the first ten years the following rates shall be the maximum monthly amount which can be charged for the water under such reasonable rules and regulations as may be promulgated by said corporation. . . . Private dwellings, four rooms or less, \$1.50. . . ."

The plaintiff tendered to the defendant company the sum of \$1.50, and demanded that it furnish water to him through

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its pipes at the property line of Ninth street, for use in his dwelling house on the lot above described. The company refused to comply with this demand unless the plaintiff would pay the further sum of \$14.50, the cost of extending the pipe line from the main to the property line and making the connection with the main. This proceeding was thereupon instituted, and resulted in the issuance of a peremptory writ of mandate, requiring the water company to comply forthwith with the demand of the plaintiff. From this order, the present appeal is prosecuted.

From the foregoing statement it will be seen that the sole question presented for our decision is, whether the property owner or the water company must defray the expense of conducting the water from the main to the property line and making the necessary connection with the main. In the absence of a valid contract or legislative control in the matter of its rates, a water company may fix and collect rates for furnishing water, provided they are reasonable and just and do not discriminate. A reasonable rate depends in a large measure upon the amount of money invested and the returns received. *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861. If the company only lays its mains in the streets, it will, as a matter of course, have less money invested than if it carries its pipes to the property line of each individual consumer, and will be compelled to charge less in the former case than in the latter; and if there be no contract or statutory or municipal regulation in the way, a regulation requiring the property owner to defray the expense of piping and conducting the water from the main to his property line and in addition to pay a reasonable monthly charge for the use of the water, would not seem unreasonable, provided the two charges combined be but a reasonable charge for the services rendered. But this case is controlled by the franchise ordinance, which requires the company to furnish water to users and consumers at certain fixed rates, and we are of opinion that it is not so furnished within the meaning

of the ordinance unless it is delivered to the consumer at his property line. *Pocatello Water Co. v. Standley*, 7 Idaho 155, 61 Pac. 518; *Bothwell v. Consumers' Co.*, 13 Idaho 568, 92 Pac. 533; *Hatch v. Consumers' Co.*, 17 Idaho 204, 104 Pac. 670; *International Water Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816; *Pine Bluff Corp. v. Toney*, 96 Ark. 345, 131 S. W. 680. The case of *State ex rel. Foley v. Hillyard Water Co.*, 49 Wash. 232, 94 Pac. 1080, is not in conflict with the views here expressed. The court there held that the plaintiff was not entitled to water from the main from which he demanded it, and no franchise or contract obligation was involved.

The judgment is affirmed.

CROW, GOSE, ELLIS, and PARKER, JJ., concur.

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[No. 10209. Department One. August 20, 1912.]

A. F. EDDY, *Respondent*, v. CHARLES CUNNINGHAM,  
*Appellant*.<sup>1</sup>

**LIBEL AND SLANDER—INSTRUCTIONS—CHARGE OF LARCENY.** In an action for slander in applying the word "thief" to an agent who had taken his principal's money, it is proper to instruct that defendant must show on his plea of justification, that the plaintiff not only took the money, but did so with criminal intent, where the plaintiff had full charge of the business, receiving all moneys and paying all demands, including his own salary, and claimed that he took the money under a good faith claim that he was entitled to take it to pay a debt.

**SAME—WORDS ACTIONABLE—"THIEF"—JUSTIFICATION.** Since calling plaintiff a "thief," is only *prima facie* actionable, malice being the gravamen of the charge, the defendant would not be liable if the words were used merely as terms of abuse in relation to a transaction that was fraudulent but not criminal, and justified by the attending circumstances and relations of the parties.

<sup>1</sup>Reported in 125 Pac. 961.



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**SAME — "PIMP" — JUSTIFICATION—TRUTH OF CHARGE—EVIDENCE.** In an action for slander in calling a man a "pimp," the plaintiff was "living with" a prostitute, within Rem. & Bal. Code, § 2440, and the defendant was accordingly justified, where it appears that the plaintiff was a clerk in a hotel where prostitutes frequently stopped for several days at a time, and that as a rule he assigned them to a room convenient to his own, and consorted with one of them regularly and with others occasionally, although there was no proof that they "lived with" each other as man and wife.

Appeal from a judgment of the superior court for Franklin county, Holcomb, J., entered May 19, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for slander. Reversed.

*H. B. Noland*, for appellant.

*Moulton & Henderson*, for respondent.

CHADWICK, J.—Plaintiff brought this action to recover damages for an alleged slander. He had been an employee of the defendant at a hotel in the city of Pasco. A part of the time he acted as auditor and clerk. His position may be described as that of a general factotum for his employer. He enjoyed his full trust and confidence, and seems to have managed the business without suggestion. Finally, defendant, being apprised of certain acts of the plaintiff, discharged him. This was done in the presence of others, and defendant is alleged to have used words that are actionable; that is, "thief" and "pimp." We think no further statement of the case is necessary. Defendant made general denial, and pleaded mitigation, justification, and the truth of the words spoken. From a judgment in favor of plaintiff, defendant has appealed.

It is first contended that the word "thief" should have been withdrawn from the consideration of the jury, for the reason that the plaintiff admitted a state of facts which made him guilty of the crime of embezzlement. This the court refused to do, and upon the particular word instructed as follows:

"To prove that plaintiff is a thief it is not enough for the defendant to show that plaintiff took money that was the property of defendant, but he must go further and show that plaintiff took defendant's money fraudulently and with a criminal intent to deprive the defendant of it. This must be established by a preponderance of the evidence. If, on the other hand, the plaintiff took the defendant's money under a good faith claim made at the time thereof that he was entitled to or had a right to take it, and did so openly and avowedly, and if you so find, then the claim of the defendant that the plaintiff was in truth a thief has failed."

The instruction is criticized because it leaves to the jury the determination of the question whether respondent took appellant's money under a good faith claim made at the time, and that he was entitled to take it and pay an alleged debt, ignoring the only defense that would avail respondent; that is, a good faith claim of title to the property or money which was converted by him. This would ordinarily be so, for no man should be heard to plead the right to pay himself a debt out of the money of another, knowing that he has no title thereto. Good faith under such circumstances demands a presentment of the claim, but instructions cannot be measured as abstract statements. Their pertinence depends upon the facts of the particular case, and the abstract must be tempered to meet the real issue. The testimony shows that respondent had full charge of appellant's business, receiving all moneys and paying all demands, including his own salary. We think, therefore, in respect to the question raised, that the instruction was drawn with a proper appreciation of the distinguishing features of the case.

Nor do we think that appellant's motions to take the consideration of the word "thief" away from the jury should have been granted. Whether the use of the word was justified, or whether appellant showed by a preponderance of the evidence a state of facts warranting an inference of guilt, was for the jury; although we have no hesitation in saying that, were we free to pass upon the question as one of law,

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the use of the word was amply justified by reference to the attending circumstances. The real question is, not whether respondent was guilty of larceny in the sense that a verdict of guilty could be sustained, for appellant does not have to prove respondent guilty beyond a reasonable doubt in order to justify his words. An important issue raised by the pleadings and the evidence is whether, considering the relations of the parties and all attending facts and circumstances, the words were used in a defamatory sense as charging a crime, or merely as words of abuse, justified by the circumstances and the former relations of the parties. This is so because the word "thief" is only *prima facie* actionable *per se*. 25 Cyc. 301. Malice is the gravamen of the charge, and where the word is used as a mere term of abuse or had relation to a transaction that was fraudulent but not criminal, it has been held that a defendant is not bound to strict proof. *Bridgman v. Armer*, 57 Mo. App. 528; *Roberts v. Ramsey*, 86 Ga. 432, 12 S. E. 644. This latter element is ignored in the instruction, though called for by the pleadings and the evidence, and, in the event of a new trial, might with propriety be noticed by the court.

In submitting the word "pimp" to the jury, the court said:

"To charge a man with being a pimp charges him with a commission of an offense or offenses against the laws of the state and which are punishable. The legal definition of the word pimp is: One who solicits other men to go to houses or places of prostitution for immoral purposes; or who solicits men to associate with prostitutes for immoral purposes; or one who in some way procures for others the means of gratifying their passions; or one who lives wholly or in part upon the earnings of an immoral woman earned by immoral practices of prostitution."

It will be seen that the court had adopted § 2440, Rem. & Bal. Code (omitting the words contained therein "every person who shall live with a common prostitute"), as a comprehensive definition of the term. Appellant requested the court to instruct the jury that, if they found from the testimony

that the respondent had been living with prostitutes at the hotel, it would be a justification of the charge. We think this instruction should have been given. The word "pimp" is not defined by statute *eo nomine*, and it would seem that one charged with using the term in a defamatory way should not be bound to prove acts or conduct that would necessarily sustain, or even justify, a criminal prosecution under § 2440 of the code. The words "living with" were rejected by the court, as we understand, because the testimony offered by the appellant showed only an occasional resort to meretricious relations, and not a living together in the sense of habitual association. The evidence of appellant tends to show, that it was the practice of certain lewd women to lodge at the hotel; that respondent assigned them as a rule to a room convenient to his own; and that one of them at least consorted regularly, and others occasionally, with him while there; that these women were there several days at a time, and frequently; that respondent entered false names of these women upon the hotel register and procured patronage for them. If this testimony is true, plaintiff encouraged the patronage of lewd women and did himself participate in their lustful practices. Under this state of facts, the law should not be too scrupulous or overtechnical in defining the term "pimp." In our judgment, there is testimony warranting the court in giving an instruction to the effect that a "living with" under the statute means a resort to sexual commerce with an abandoned woman under such circumstances as would show previous arrangement and understanding. The offense lies in the reputed or acknowledged character of the women, rather than in the character or frequency of the act. The law never intended that the innocent meaning of the words "living with," as applied to husband and wife or to people of chaste character, should be applied to those who habitually, even for a brief season, consort in adulterous intercourse. In such case the words have a meaning of their own, and it is well understood. The new criminal code, in

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its definition of the crimes of adultery and lewdness, seems to recognize this principle, and has dropped from the law the common law element of "living with," as used in the older and stricter sense. We do not want to be understood as holding that an occasional act of lewdness would sustain the charge, but only that where, as it may have been in this case, the respondent found comfort and companionship from day to day and from time to time in the society of fallen women, the jury would in law be justified in applying the word "pimp."

Because of these errors, appellant's motion for a new trial should have been sustained. Wherefore the judgment of the lower court is reversed, and the case remanded for further proceedings.

GOSE, CROW, PARKER, and ELLIS, JJ., concur.

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[No. 10181. Department One. August 20, 1912.]

FALLS CITY MACHINERY AND SUPPLY COMPANY, *Respondent*,  
v. DAVID GOODSTEIN *et al.*, *Appellants*.<sup>1</sup>

APPEAL—REVIEW—FINDINGS. Findings upon conflicting evidence will not be disturbed if sustained by any evidence.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 20, 1911, upon findings in favor of the plaintiff, in an action on contract. Affirmed.

*L. L. Westfall*, for appellants.

*Campbell & Goodwin* and *J. B. Campbell*, for respondent.

PER CURIAM.—The only question involved is one of fact. Action was brought by plaintiff to recover the reasonable value of certain work done by it at the special instance and request of the defendants. The defense was that the parties had made an express contract, and that the demand was in

<sup>1</sup>Reported in 125 Pac. 786.

excess of the contract price. The amount admitted to be due, less the amount of a counterclaim, was tendered. From findings and a judgment in favor of plaintiff, appeal is taken.

We are asked, because of certain testimony which is set out in the brief, to ignore the rule of practice, so often announced, that we will not disturb the findings of the trial judge if there be any testimony to sustain it. But, taking the testimony relied on at its full worth, a careful reading of the record convinces us that there is still such conflict as to call for the application of the rule. It may be true that the minds of the parties never met. Certain it is that, whatever the decision of the lower court might have been, or that of this court may be, the losing party will still be unconvinced; for we are impressed with the good faith of all parties to this piece of litigation. It is just this result that makes the rule suggested almost imperative, and the court below having found for the respondent and there being some evidence to sustain the judgment, we do, upon the principle announced, affirm the judgment of the lower court.

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[No. 10204. Department One. August 20, 1912.]

RICHARD ANGEL, *Appellant*, v. COLUMBIA CANAL COMPANY,  
*Respondent*.<sup>1</sup>

VENDOR AND PURCHASER—RESCISSION BY VENDEE—NOTICE OF ELECTION. The commencement of an action for cancellation of executory contracts for land is a sufficient notice of an election to rescind, as a release of the contracts could be provided for in the decree.

SAME—RIGHT TO RESCIND—WAIVER—LACK OF DILIGENCE. One seeking rescission of a contract for fraud must act promptly upon discovering the fraud; and the right to rescind for fraudulent representations as to an abundant water supply is waived, where the purchaser knew, before he signed the contract, of a shortage in the water supply, but took and retained possession for a year before bringing suit.

<sup>1</sup>Reported in 125 Pac. 766.

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Opinion Per Gose, J.

Appeal by plaintiff from a judgment of the superior court for Walla Walla county, Brents, J., entered July 21, 1911, upon findings in favor of the defendant, in an action for rescission, denying a rescission and granting plaintiff a money judgment. Affirmed.

*W. B. Mitton*, for appellant.

*Shank & Smith and Pedigo & Smith*, for respondent.

Gose, J.—Suit for a rescission of two contracts for the sale of real estate. Rescission denied, and money judgment entered for the plaintiff, who has appealed.

In the month of February, 1909, the appellant, then a resident of the city of Duluth, in the state of Minnesota, was attracted by an advertisement of the lands of the respondent located at Attalia, Walla Walla county, in this state, and called upon its sales agent at that place to discuss them. As a result of the discussion, he entered into a written contract with the respondent on the 25th day of February, for the purchase of two five-acre tracts. On the 5th day of June, he made a second contract with it, for the purchase of a third five-acre tract, and on the 3d day of July he made a third contract with it for the purchase of a like tract. Thereafter he left his home in Duluth for the purpose of taking up his residence at Attalia, and arrived there about the middle of October, 1909. He then examined the tracts of land embraced in his contracts, and being dissatisfied with them, arranged with the respondent to exchange them for two five-acre tracts. This arrangement was made on the 3d day after his arrival at Attalia. He had paid \$1,725 on the earlier contracts, and was credited with that sum in the new contracts. The new contracts were not executed until the 7th day of December.

At the time of making the first purchases, the appellant had been a railroad bridge builder for twenty years, and had no knowledge of irrigation. The basis of his complaint is that the respondent's sales agent at Duluth represented that

the respondent had an inexhaustible supply of water for the irrigation of its lands, and that later at Attalia its manager made a like representation, when in fact its water supply was wholly inadequate. The sales agent at Duluth, for the purpose of inducing the appellant to enter into the contract, gave him one of the respondent's illustrated circulars, which stated that it "obtained an ample and inexhaustible gravity supply of water from the Walla Walla river." The circular shows the river, dam, and canal. The appellant testified that the sales agent further said to him that he need not fear a shortage of water as the respondent had a great reservoir which contained enough water to meet all demands for from fourteen to sixteen years, and that he entered into the contracts relying upon these representations. He further testified that, a few days after he arrived at Attalia, a number of reliable people informed him that the respondent could not furnish water sufficient to produce crops; that he then told Mr. Given, the respondent's manager, that he had "learned" that it did not have water; that the manager said that the company had an abundance of water; that the tunnel had caused trouble that season, "but when they got it fixed" there would be an adequate supply of water for all purposes; that relying on his statement, he continued making improvements; that a few days later he told the manager that he wanted his money; that the latter replied that he "would not do anything for me;" that witness "counted eleven families moving away then," and that later he signed the new contracts.

The appellant and his wife both testified that they got the first water for irrigation in the season of 1910 on the 24th day of April, and intermittently thereafter until the 3d day of July, and that they had no water thereafter until in September. The appellant also testified, that the tunnel was repaired before the irrigation season opened; that the shortage of water was caused by the drying up of the waters of the Walla Walla river, the source of the defendant's canal; and that a few days after he reached Attalia, he made inquiry



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about the reservoir, of "the people living there" and of the respondent's manager, and that the latter informed him that they had an abundance of water. Both the respondent's manager, Mr. Given, and its horticulturist, Mr. Wright, testified that they made no representations to the appellant about the supply of water. The respondent obtains its water supply by a gravity flow from the Walla Walla river and an auxiliary pumping plant on the Columbia river. An unprecedented drought in 1910 caused the former to go dry, and lowered the latter several feet below the intake. The appellant left the land in September or October. His wife remained there until December 4. The action was commenced on October 17. Upon the facts stated, the court denied rescission, and gave the appellant a judgment for \$150 damages and costs in consequence of the respondent's failure to furnish water for the irrigation of the lands, "as provided in the contract."

The prayer of the complaint is "that said contract of purchase be delivered up to be canceled," and for damages. There was no demand for a rescission after the execution of the contracts, prior to the filing of the complaint. The commencement of the action for a cancellation of the executory contracts, if timely, was a sufficient notice of an election to rescind. The execution of a release of the contracts could have been provided for in the decree. *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634.

One who seeks to avoid a contract which he has been induced to enter into by the fraudulent representations of another touching the subject-matter of the contract, must proceed with reasonable promptitude upon discovering the fraud, or he will be held to have waived his right to rescind. *Skoog v. Columbia Canal Co.*, 63 Wash. 115, 114 Pac. 1034; *Stelter v. Fowler*, 62 Wash. 345, 113 Pac. 1096, 114 Pac. 879; *Owen v. Pomona Land & Water Co.*, 131 Cal. 530, 63 Pac. 850, 64 Pac. 253; *Culver v. Avery*, 161 Mich. 322, 126 N. W. 439; *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879, 9 L. R. A. 607, and foot note.

The appellant did not act promptly after he became aware of the actual conditions at Attalia. According to his own testimony, he knew before he signed the contracts in suit that there had been a shortage in the supply of water that season. He says he was so advised by reliable people. He says that, when he disclosed his information to the respondent's manager, the latter said that there would be an abundance of water when the tunnel was fixed. He knew that the tunnel was repaired before the commencement of the irrigation season, and he says that he had no water until the 24th day of April, and that he only had it intermittently thereafter until the 3d day of July, when the supply ceased altogether until some time in September. Despite this knowledge and the information that he must have gained from living in the neighborhood—a small community where water was the chief resource and no doubt the leading topic of conversation, he took and retained possession of the land until after the commencement of the action, set out fruit trees, and planted alfalfa, berries, and vegetables, and made other improvements. His conduct was equivalent to an election to affirm his contracts, and he is precluded, under all the authorities, from making a second election.

The judgment is affirmed.

CROW, CHADWICK, ELLIS, and PARKER, JJ., concur.

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Statement of Case.

[No. 10292. Department One. August 20, 1912.]

THE STATE OF WASHINGTON, *on the Relation of W. S. Powell,*  
*Appellant, v. C. M. FASSETT et al., Respondents.*<sup>1</sup>

**APPEAL AND ERROR—BRIEFS—ASSIGNMENT OF ERRORS.** A brief will not be struck out for failure to clearly assign the errors, where the errors relied upon are sufficiently indicated.

**APPEAL AND ERROR—SEVERAL JUDGMENTS—NOTICE—BOND—SUFFICIENCY.** One notice of appeal and one appeal bond is all that is required although there are two judgments dismissing the several defendants in the case.

**MUNICIPAL CORPORATIONS—OFFICERS—SALARIES—LIABILITY.** In *quo warranto* against a city and an incumbent claiming plaintiff's office, the city is absolved from liability to plaintiff where it had paid the incumbent the entire salary up to the time of the trial.

**QUO WARRANTO—WHEN LIES—WHO ARE "OFFICERS."** *Quo warranto* lies in favor of a foreman of construction work, even if he is not an "officer" as defined by the common law, where the city charter adopts the merit system and applies it to all employees placed in the civil service list with manifest intent to classify such positions as offices and to have such officers removable only for cause.

**MUNICIPAL CORPORATIONS—CHARTERS—CONSTRUCTION—CIVIL SERVICE.** Under Spokane charter adopting the merit system, section 53, providing that employees in office at the time of the adoption of the charter shall retain their positions unless removed for cause is immediately operative, notwithstanding section 120, providing for a classification of officers and employees which cannot be made until after the election of commissioners three months after adoption of the charter.

**QUO WARRANTO—PARTIES—PROPER NECESSARY DEFENDANTS.** In *quo warranto* to oust an illegal appointee of the commissioner of public utilities and to restore the plaintiff to the position and for damages, the commissioner in his official capacity is a proper party defendant; since plaintiff is not required to resort to two actions where one will suffice.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered February 20, 1912, dismissing certain defendants in *quo warranto*, upon sustaining

<sup>1</sup>Reported in 125 Pac. 963.

their demurrers to the complaint, and from a judgment of dismissal entered February 23, 1912, by Bell, J., after a trial on the merits. Reversed.

*E. O. Connor* and *F. B. Morrill*, for appellant.

*A. M. Craven* and *Wm. E. Richardson*, for respondents *Fassett et al.*

*Harris Baldwin*, for respondent *Burke*.

Gose, J.—This is a *quo warranto* proceeding. The complaint alleges and the record shows, that the city of Spokane is a municipal corporation of the first class; that on December 28, 1910, it adopted a new charter; that the defendant Fassett is, and since the 14th day of March, 1911, has been, commissioner of public utilities of the city; that the plaintiff on the 1st day of July, 1909, was appointed to the position of construction foreman in the water construction department of the city, and continued in that position and performed the duties thereof up to and including the 28th day of January, 1911, at the monthly salary of \$125 per month; that the position was placed in the classified civil service by the civil service commission of the city, on the 27th day of April, 1911; that the new charter provides that all employees in office at the time of its adoption shall retain their positions unless removed for cause; that on the 28th day of January, 1911, the plaintiff received a notice from the superintendent of the water department of the city, to the effect that he was "relieved" from duty; that on January 30 said superintendent issued a notice to the effect that the defendant Burke had succeeded the plaintiff as general foreman of construction; that Burke has ever since held the position; that the plaintiff was dismissed without notice and without a hearing, and that his name was stricken from the pay roll of the city. The prayer of the complaint is, that the defendant Burke be ousted; that Fassett as commissioner of public utilities be required to restore the plaintiff to his former position and reinstate his name upon the pay roll of the city;

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that the plaintiff have judgment against the defendants for his salary since the day of his removal at \$125 per month, "and that said salary be paid to said plaintiff by the city of Spokane and the defendants herein." The defendants the city and Fassett, as commissioners of the public utilities of the city, filed separate demurrers, setting up the first, fourth, sixth, and seventh grounds of the statute, Rem. & Bal. Code, § 259. The demurrers were sustained, and the plaintiff declining to plead further, a judgment of dismissal and for costs was entered on the 20th day of February, 1912. The defendant Burke answered and, after trial, a judgment of dismissal with prejudice and for costs was entered in his favor, on the 23d day of February following. On March 15, the plaintiff served and filed a single notice of appeal from both judgments. On March 18 he filed an appeal bond with appropriate reference to the two judgments.

The respondents have moved (1) to strike the briefs on the ground that the errors are not clearly assigned, and (2) to dismiss the appeal and affirm the judgment because of the appellant's failure to serve and file a separate notice of appeal and a separate appeal bond upon each judgment. Upon the first ground, it suffices to say that we think the errors relied upon are sufficiently indicated to warrant their discussion. The motion to dismiss is without merit. There is but one case and one notice of appeal, and one appeal bond suffices, although there are two judgments. Rem. & Bal. Code, § 719; *First Nat. Bank of Wenatchee v. Fowler*, 51 Wash. 638, 99 Pac. 1034; *O'Connor v. Force*, 58 Wash. 215, 108 Pac. 454, 109 Pac. 1014; *Weatherall v. Weatherall*, 50 Wash. 344, 105 Pac. 822.

In the *Fowler* case, four actions were consolidated for trial, but separate findings and decree were entered in each case. A motion was made to dismiss the appeal because there was but one notice of appeal and but one appeal bond. In denying the motion, we said that the appellant had a right to

treat it as one action, and that "there was but one subject-matter involved."

We need not consider whether the demurrer of the city was properly sustained, as the evidence submitted at the trial shows that the city had then paid the entire salary to Burke up to that time. This absolved it from liability to the appellant to that date. *Samuels v. Harrington*, 43 Wash. 603, 86 Pac. 1071, 117 Am. St. 1075.

The respondents Fassett and Burke contend that *quo warranto* does not lie, because the appellant's position is a subordinate one and not an office within the meaning of the charter or the code, Rem. & Bal., § 1034. The new city charter establishes a commission form of government. Its applicable provisions are as follows:

"Commission, rules and powers: The commission, with the approval of the council, shall make such rules and regulations for the proper conduct of its business as it shall find necessary and expedient. The commission, among other things, shall provide for the classification of all employees, except day laborers and the appointive offices mentioned in sections twenty-four (24), twenty-five (25) and thirty-two (32) of this charter; for open competitive and free examination as to fitness; for a period of probation before employment is made permanent; for an eligibility list from which vacancies shall be filled; and for promotion on the basis of merit, experience and record.

"Employees within the scope of this article who are in office at the time of the adoption of this charter shall retain their positions, unless removed for cause.

"The council may, by ordinance, confer upon the commission such further rights and duties as may be deemed necessary to enforce and carry out the principles of this article." Sec. 53.

"Continuation of existing government and offices: The government and offices existing prior to the adoption of this charter, shall continue until the election and qualification of officers first elected under this charter at the general election in March, 1911.

"The provisions of this charter with reference to elections, recall of elected officers, direct legislation and charter amend-

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ments shall be in force from the date of the adoption of this charter. All other provisions of this charter shall become effective on the assumption of office of the commissioners first elected thereunder." Sec. 120.

In adopting the charter, the people of the city made it as plain as written language can make it that the merit system should thereafter obtain. It applies to all employees placed in the classified civil service list, and the manifest intent was to classify such positions as offices, and to have such officers removable for cause only. The charter was in effect when the appellant was relieved from duty without a hearing, and so far as record discloses, without cause. The appellant would probably not be an officer as defined by the common law, but the clear intent of the charter is to afford him all the protection of an officer. The people who created the charter did not intend to give him the right to be retained in office without affording him an adequate remedy if he should be removed in violation of the plain provisions of that instrument. *State ex rel. Young v. Smith*, 19 Wash. 644, 54 Pac. 33.

The respondent Burke argues that section 53 of the charter did not become operative until after the assumption of office by the commissioners first elected. It is true that the commission could not provide for a classification of officers until after the election of the commissioners in March, 1911. Section 53, however, expressly continued in office all employees "who are in office" at the time of the adoption of the charter, unless removed for cause. The clause in § 120, to the effect that "all other provisions of this charter shall become effective on the assumption of office by the commissioners first elected thereunder" means all other provisions applicable to a commission form of government which were to be executed by the commission thereafter to be elected, and was not intended to nullify the clause in § 53 which embraces only those who were in office at the time the charter was adopted.

The contention of the respondent Fassett, that he is not a

proper party defendant, is untenable. The purpose of the information is two-fold. (1) to oust Burke and to require Fassett as commissioner of public utilities to restore the appellant to office, and (2) for damages. The first object can only be accomplished by making Fassett in his official capacity a party defendant. *State ex rel. Heilbron v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495. In interpreting our *quo warranto* statute, Rem. & Bal. Code, § 1034 *et seq.*, the court said in the *Heilbron* case:

"This information is, under the code, a plain statement of the facts (§ 681), and therein is just like a complaint upon any other cause of action; that it is to be filed upon the relation of some one is the only even formal difference between this proceeding and an ordinary civil action."

A litigant is not required to resort to two actions where one will suffice, nor was the appellant required to anticipate at his peril whether the commissioner of public utilities would restore him to office if he obtained a judgment against the intruder. The appellant is entitled to a decree directing the commissioner of public utilities to restore him to office and to reinstate him upon the pay roll of the city, and to a judgment against the respondent Burke for his damages.

Reversed and remanded for further proceedings in conformity with this opinion.

CROW, PARKER, and ELLIS, JJ., concur.

CHADWICK, J. (concurring)—I concur in the judgment of my associates, but I believe it is not out of place to say that this case illustrates one of the inconsistencies of modern tendencies in municipal government. I believe in a freer democracy and a rule of civil service, but I find myself unable to harmonize these theories with the theory of centralized power and authority comprehended in the commission form of government. The first principle of the latter plan is to centralize authority and fix responsibility; to distribute the functions of government among a lesser number of men than



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heretofore, and charge them with full responsibility for their conduct, and to recall them if inefficient or corrupt. Now it needs no argument to demonstrate the fact that officers so situated and subject to such hazards should have full power to dispense with the services of any mere employee. It is manifestly unjust to charge a commissioner with responsibility and compel him to depend, in the execution of his plans, upon those who may even be hostile to him and to his ideas. *State ex rel. McReavy v. Burke*, 8 Wash. 412, 36 Pac. 281. Such is the case here. But the same hand that put the principal responsibility upon the commissioner followed it with provisions which tie his hands and shackle his judgment, and when the people in their sovereign capacity adopt both provisions, courts, which are powerless to control legislative policy, should not be called upon to re-write the charter of a self-governing city. There is a science in law-making, and too often, when sentiment is allowed to usurp its place, we find a situation such as is here disclosed.

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[No. 10235. Department One. August 20, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.

JOHN A. HAMILTON, *Appellant*.<sup>1</sup>

INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENSE—ASSAULT AND BATTERY. Under the rule that at common law an indictment for assault and battery need not set out the particular acts of violence constituting the offense, a conviction for assault in the third degree (defined by Rem. & Bal. Code, § 2415, as an assault or assault and battery not amounting to the first or second degree) may be had under an information for manslaughter charging an assault upon a pregnant woman and her unborn child with intent to cause a miscarriage and resulting in her death, where, omitting that portion relating to the death, it satisfies all requirements of a charge of assault and battery.

<sup>1</sup>Reported in 125 Pac. 950.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 17, 1911, upon a trial and conviction of assault and battery. Affirmed.

*Dunphy, Evans & Garrecht*, for appellant.

*Everett J. Smith*, for respondent.

PARKER, J.—The plaintiff was charged, by information filed in the superior court for Walla Walla county, with the crime of manslaughter, as follows:

“On the 26th day of August, 1911, at and within the county aforesaid, in and upon one Della Reams, then and there being, the said John A. Hamilton and Alice J. Prather did commit an assault, she, the said Della Reams, being then and there a woman pregnant with a quick child, and upon her, the said Della Reams, did then and there use and employ, and caused to be used and employed, certain instruments and other means, the names, kinds and descriptions of which are to this informant unknown, with intent then and there to cause the miscarriage of her, the said Della Reams, so pregnant as aforesaid, such miscarriage not being then and there necessary to preserve the life of her, the said Della Reams, and, with the instruments and other means by them, the said John A. Hamilton and Alice J. Prather, so used and employed with the intent aforesaid, did then and there inflict upon her, the said Della Reams, and upon the said quick child of which she was then and there pregnant as aforesaid, divers wounds, punctures and other mortal injuries, and did then and there and thereby produce the death of her, the said Della Reams, and of the said quick child, and did then and there and thereby commit the said crime of manslaughter.”

Upon the trial, the jury found the defendant Hamilton guilty of assault in the third degree. Thereupon the court adjudged that he pay a fine of \$150 and costs of prosecution. From this judgment he has appealed.

The principal and only contention made by counsel for appellant which we deem necessary to notice is, that a conviction cannot be lawfully had for assault in the third degree under this information, because such crime is not included within the crime of manslaughter as therein charged. The

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question then is reduced to this, does the language of this information charge the crime of assault in the third degree as well as the crime of manslaughter? It of course cannot be seriously contended but that such a crime may be included in the crime of manslaughter. Under the new criminal code of 1909, there is no statutory definition of the crime of assault, nor of assault and battery, which constitutes the misdemeanor of assault in the third degree. Assaults in the first and second degrees are distinguished from assault in the third degree, in that the former are committed with a felonious intent. Rem. & Bal. Code, §§ 2413, 2414, 2415.

The latter section defines assault in the third degree as follows:

“Every person who shall commit an assault or an assault or battery not amounting to assault in either the first or second degrees, shall be guilty of assault in the third degree, and shall be punished as for a gross misdemeanor.”

Since the meaning of the words “assault” and “assault and battery” are not defined by statute, we must resort to their common law meaning. Now the authorities seem to be uniform in holding that in charging assault or assault and battery, when those words are used only in their common law meaning, an indictment or information need not set out the particular acts of violence which constituted the assault or assault and battery. 2 Bishop, Directions and Forms, § 201; 1 McClain, Criminal Law, § 252.

The argument of counsel for appellant seems to proceed upon the theory that this information is defective as charging assault or assault and battery, in that it fails to sufficiently charge the facts other than the mere facts of assault and assault and battery which it is argued are mere conclusions. Assuming that these general facts only are charged, the only decision of this court which may seem to support this view is that in the case of *State v. Heath*, 57 Wash. 246, 106 Pac. 756. But an examination of that decision will show that the court was dealing with the old statute defining assault

and assault and battery, Rem. & Bal. Code, § 2746; Bal. Code, § 7055. That statute however was expressly repealed by the new criminal code, Laws of 1909, p. 906, when Rem. & Bal. Code, §§ 2413, 2414, and 2415 were enacted, leaving the words assault and assault and battery without any statutory definition. Judge Fullerton's dissenting opinion in that case would no doubt have been adopted as the views of the majority had there been no statutory definition of the crime of assault under the old law then under consideration. The authorities collected in his dissenting opinion clearly show that at common law it is only necessary to charge that the defendant did make an assault, etc., without stating the acts of violence committed, and it is only because of the statutory definition of the term under the old statute that it became necessary to charge more. This difference is noticed in 2 Bishop, Directions and Forms (2d ed.) §§ 204, 205; and in 1 McClain, Criminal Law, § 252. Omitting from this information that portion which has reference to the death of Della Reams, it clearly satisfies all requirements of a charge of assault and assault and battery. We conclude that the information was sufficient in that respect, and that a conviction thereunder for assault in the third degree as now defined by statute can be lawfully had. Our decision in *State v. Copeland*, 66 Wash. 243, 119 Pac. 607, is in harmony with this view.

Some contentions are made upon the introduction of evidence, but they rest upon the sufficiency of the information as charging assault and assault and battery, and therefore do not require further discussion. The judgment is affirmed.

GOSE, CROW, ELLIS, and CHADWICK, JJ., concur.

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Opinion Per CROW, J.

[No. 10236. Department One. August 21, 1912.]

S. J. HILL, *Respondent*, v. PACIFIC STATES LUMBER  
COMPANY, *Appellant*.<sup>1</sup>

DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES. A verdict for \$1,000 for injuries sustained by a hook tender, earning \$3.50 a day, will not be set aside as excessive, where he was severely bruised and injured about the head and neck, and there was evidence that his neck was stiff and sore, that he was physically unfit for his former employment, and that it would probably be a year or more before he recovered.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered December 27, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a hook tender in a logging camp. Affirmed.

*Hayden & Langhorne*, for appellant.

*Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats*, for respondent.

CROW, J.—Action by S. J. Hill against Pacific States Lumber Company, a corporation, to recover damages for personal injuries. From a verdict and judgment for \$1,000, the defendant has appealed.

Appellant's only contention is that the damages are so excessive as to show the influence of passion and prejudice. Respondent was employed as a hook tender in appellant's lumber camp, earning \$3.50 per day, and on March 15, 1911, was injured by a wire cable striking him on the left side of his face and neck. He contended, and introduced evidence to show, that he was severely bruised and injured about his neck and head; that the striking of the cable made him unconscious for perhaps half an hour; that he was taken to appellant's emergency hospital near the camp, where he

<sup>1</sup>Reported in 125 Pac. 959.

remained under treatment for two days and two nights; that he then went to his home in Tacoma where he remained until April 17, 1911, when he accepted employment as a loader in a shingle mill; that he was unfit to do the work, and for that reason was discharged after working three and one-half days; that his next employment was with appellant at his old work, where he remained for about one month when he was again discharged; that during all this time and until the date of the trial, which occurred on December 11, 1911, he continually suffered from severe pains in the back of his head and neck; that after working for appellant, he worked for a short time as a second faller of trees; that he has since been employed at trucking in the city of Tacoma, where his work is not steady; that since his injury he received the same wages as before; that his neck is stiff and sore; that his activity is only about fifty per cent of what it was prior to his injury, and that he is physically unfit for his former employment. The physician who treated respondent testified that, in his opinion, there had been a strain of the ligaments of the joints, which he explained was a wrenching or stretching of the joints, a tearing of the attachment of the ligaments, and that it would probably be a year or more from the date of the trial before he would recover. Two physicians who had examined respondent the day before the trial, about nine months after the accident, and were called as witnesses for appellant, testified that respondent complained of and seemed to have a stiff neck; that they could discover no objective symptoms, and that, aside from his statements and the fact that he turned his neck only partially when requested to move it, his condition seemed to be normal. The company physician, who examined and treated respondent immediately after his injury, testified, as a witness for appellant, that respondent was then severely bruised, that he was suffering much pain, but that no injury had occurred to the vertebrae of his neck.

Upon this evidence the verdict may perhaps seem large,

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as appellant has not lost much time, and still has earning capacity. Yet the evidence is so conflicting that we cannot say the award is sufficiently excessive to show passion or prejudice on the part of the jury. From the evidence of the physicians produced by appellant, it is possible that such a conclusion might be reached; but if the statements of respondent and his physician be accepted as true, a different result would follow. The jury saw the witnesses, heard them testify, passed upon their credibility, weighed their evidence, and undoubtedly found that respondent has endured continued pain and suffering, and has been injured as he contends. The trial judge, who also saw respondent and the witnesses and heard them testify, has sustained the verdict. While the verdict may seem large, we are unable to conclude from all the evidence that it is sufficiently excessive to disclose passion or prejudice.

The judgment is affirmed.

PARKER, GOSE, and CHADWICK, JJ., concur.

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[No. 10300. Department Two. August 21, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. F. F. NEITZEL,  
*Appellant*.<sup>1</sup>

VAGRANCY—"FORTUNE TELLING." One who, for a fee, casts horoscopes and professes to tell future events in the life of the sitter, is guilty of fortune telling, within Rem. & Bal. Code, § 2688, providing that every person who receives any compensation for fortune telling is a vagrant; and it is immaterial that his means of telling fortunes was based upon a science or the principles of astrology.

CONSTITUTIONAL LAW—CIVIL RIGHTS—RELIGIOUS LIBERTY—FORTUNE TELLING. Rem. & Bal. Code, § 2688, prohibiting "fortune telling" for a compensation is valid, notwithstanding the principles of religion laid down by the "National Astrological Society" include the practice of casting and reading horoscopes; since harmful practices may be prohibited though religious beliefs and opinions may not be interfered with.

<sup>1</sup>Reported in 125 Pac. 939.

Appeal from a judgment of the superior court for Spokane county. Sullivan, J., entered September 12, 1911, upon a trial and conviction of vagrancy. Affirmed.

*Crandell & Crandell*, for appellant.

*Jno. L. Wiley, Robt. L. McWilliams*, and *Geo. R. Lovejoy*, for respondent.

MOUNT, J.—The defendant was convicted of vagrancy, under a statute which provides: "Every person who asks or receives any compensation, gratuity or reward for practicing fortune telling, palmistry or clairvoyance . . . is a vagrant." Rem. & Bal. Code, § 2688. He has appealed from a judgment based upon the verdict of a jury.

The evidence shows that the prosecuting witness was a police officer in the city of Spokane. He went to the defendant's office and requested the defendant to tell his fortune. The defendant replied that he could not tell his fortune, but that he could "figure it out," and that his charges therefor would be one dollar. The defendant then, after inquiring the date of birth of the witness, proceeded to make some figures upon a diagram or horoscope, and then explained to the witness that these figures indicated past and future events in his life, which the defendant proceeded to tell to the prosecuting witness, for which the witness paid to the defendant the sum demanded.

In defense counsel sought to show that astrology is a science, and that the chart or horoscope made by the defendant was correct and in harmony with the principles of astrology. The court denied this offer, for the reason that the statute prohibits fortune telling, and that it was therefore unimportant that the means of telling fortunes was based upon a science. In his brief, counsel for defendant states that the "vocation of the defendant was casting horoscopes, drafting a map of the heavens at the time of one's birth, and the interpretation of horoscopes by tracing movements of the planets to ascertain their relative positions at a given



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date, the aspects resulting therefrom, and their influences upon life." He then proceeds to argue and cite authorities to the effect that the right to pursue a lawful calling is a constitutional right which cannot be invaded. The authorities cited are not in point, because the statute makes fortune telling for compensation unlawful, regardless of the means employed. It is plain that the defendant was engaged in fortune telling, for he was professing to tell future events in the life of the witness. The statute is clearly valid. *State v. Kenilworth*, 69 N. J. L. 114, 54 Atl. 244; *People v. Elmer*, 109 Mich. 493, 67 N. W. 550.

The fact that defendant was a regularly ordained minister in "National Astrological Society," and that the principles of religion laid down by that society include the practice of casting and reading horoscopes, was equally unimportant, because, while religious beliefs and opinions may not be interfered with, harmful "practices" may be prohibited. *Reynolds v. United States*, 98 U. S. 145; *Smith v. People* (Colo.), 117 Pac. 612.

The alleged errors based upon the instructions are decided by what is said above. We find no error. The judgment is therefore affirmed.

MORRIS, FULLERTON, ELLIS, and CROW, JJ., concur.

[No. 10388. Department Two. August 21, 1912.]

MARGARET MARSH *et al.*, *Respondents*, v. L. C. FISHER,  
*Appellant*, and G. B. CARTER, *as Sheriff, Defendant*.<sup>1</sup>

HUSBAND AND WIFE—COMMUNITY PROPERTY—PERSONAL EARNINGS OF WIFE. Where the wife's personal earnings are community property, Rem. & Bal. Code, § 570, exempting them from attachment or execution upon any liability against the husband, does not exempt them from execution upon a judgment against the community.

SAME. A wife's personal earnings are her separate property only where she is living separate and apart from her husband, in the absence of any agreement between husband and wife with respect thereto.

SAME—AGREEMENT AS TO PERSONAL EARNINGS OF WIFE. An agreement between husband and wife that the earnings of each while living together shall be the separate property of each cannot affect existing creditors of the community.

Appeal from a judgment of the superior court for Whitman county, Neill, J., entered November 10, 1911, upon findings in favor of the plaintiffs, in an action of claim and delivery, after a trial to the court. Reversed.

*Samuel P. Weaver*, for appellant.

*Jno. I. Melville* and *J. M. McCroskey*, for respondents.

MOUNT, J.—This is an action under the statute, for claim and delivery of personal property levied upon by the sheriff under an execution. Plaintiffs delivered to the sheriff an affidavit, claiming certain horses levied upon, and stating the value of the horses at \$750. A bond in the sum of \$1,500 was also delivered to the sheriff, conditioned, as required, that the claimants would make good their title to the property, or return the property, or pay the value to the sheriff. On a trial of the case, it appeared that L. C. Fisher, in the year 1911, recovered a judgment against the community consisting of Margaret Marsh and her husband, Wesley Marsh.

<sup>1</sup>Reported in 125 Pac. 951.

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This indebtedness was incurred prior to 1901. In that year Mrs. Marsh and her husband entered into an oral agreement to the effect that Mr. Marsh would operate a threshing machine and receive the proceeds of such business as his separate property; that Mrs. Marsh would run the farm and receive the proceeds thereof as her separate property. About the same time Mrs. Marsh and her two sons entered into an agreement by which they were to run the farm and divide the proceeds, one-third to each. Thereafter, with the proceeds of the farm, Mrs. Marsh and her two sons purchased the five horses levied upon. Mr. Marsh, the husband, resided with his family and did chores around the farm to pay for his board. When he did other work, he was paid wages therefor. Mrs. Marsh and her husband have abided by the contract ever since it was made as above stated. There is no claim that Mr. Fisher, the judgment creditor, had any notice of the contract between the judgment debtors. The trial court concluded that the horses levied upon were the separate property of Mrs. Marsh and her two sons, and were not subject to the community debts of Mr. and Mrs. Marsh. A judgment was accordingly entered in favor of the plaintiffs. Mr. Fisher, the judgment creditor, has appealed.

It appears from the record that the trial judge based his conclusion upon the fact that the wife's portion of the proceeds of the farm, as conducted by herself and her two sons, was her personal earnings, and that such earnings, under § 570, Rem. & Bal. Code, "shall be exempt from attachment and execution upon any liability or judgment against the husband." But this property was seized upon a judgment against the community. If the property seized was not the separate property of the wife, but was common property, the statute does not exempt it from execution upon a judgment against the community. In *Abbott v. Wetherby*, 6 Wash. 507, 33 Pac. 1070, 36 Am. St. 176, it was held that the personal earnings of the wife became separate property only when she is living separate from her husband. It is conceded

in this case that Mrs. Marsh and her husband were at all times, and still are, living together. Her personal earnings were, therefore, community property, unless the agreement above referred to made such earnings her separate property. In *Yake v. Pugh*, 13 Wash. 78, 42 Pac. 528, 52 Am. St. 17, it was held that, under an agreement between the spouses, the personal earnings of the wife were her separate property, and that such earnings were divested of the community character in so far as subsequent creditors were concerned. That case is not controlling in this case, because here the appellant was a creditor at the time the agreement was made.

In *Sherlock v. Denny*, 28 Wash. 170, 68 Pac. 452, we declined to extend the rule in *Yake v. Pugh* to include a general agreement to the effect that whatever the wife earned was her own money. We there said: "But we do not think the rule should be extended further." In *Dobbins v. Dexter Horton & Co.*, 62 Wash. 423, 113 Pac. 1088, we followed the rule in *Yake v. Pugh*; but we have not held in any case that the spouses may agree that the personal earnings of the wife may be held as her separate property, as against creditors existing at the time of the agreement and where the parties continue to live together, except the case of *Brookman v. State Ins. Co.*, 18 Wash. 308, 51 Pac. 395, where it was said:

"Under our statute there is no question but that Mrs. Hall, although a married woman, had a right to lease a farm and prosecute the business of farming in her separate interests, and her testimony in this case, if the jury believed it to be true, would constitute this business her separate business."

But that case was expressly overruled upon that point, in *Main v. Scholl*, 20 Wash. 201, 54 Pac. 1125, where it was held that property acquired after marriage is community property. We are satisfied that this is the rule under our statute, and that the agreement of the parties that the earnings of each should be separate property did not affect exist-

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ing creditors. Any other rule would open the way for fraud and render the statutes relating to community property of no effect. The court, therefore, erred in concluding that the interest of Mrs. Marsh in the horses was a separate property interest. The evidence in the case clearly shows that the sons of Mrs. Marsh owned a two-thirds interest in the horses. This interest, of course, was not subject to the execution.

The judgment appealed from is therefore reversed as to Mrs. Marsh, and the cause is remanded with directions to enter a judgment against her and the sureties upon the bond for \$250, being her interest in the horses.

MORRIS, ELLIS, and CROW, JJ., concur.

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[No. 10081. Department One. August 21, 1912.]

JOHN JORGENSEN *et al.*, *Appellants*, v. J. B. WINTER,  
*Respondent*.<sup>1</sup>

INSANE PERSONS—RESTORATION OF SANITY—DISCHARGE OF GUARDIAN—JURISDICTION—NOTICE—ADVERSARY PROCEEDING. Under Rem. & Bal. Code, § 1671, providing that when the court shall receive information that an insane ward has recovered his reason, it shall immediately inquire into the facts, and discharge the ward if found to be of sound mind, no notice to the ward is necessary to authorize a discharge of the guardian, since the court has jurisdiction through the appointment and qualification of the guardian, and the proceeding is not an adversary proceeding requiring notice.

JUDGMENT — JURISDICTION — PRESUMPTIONS—COLLATERAL ATTACK. An order discharging a guardian of an insane person by a court having general jurisdiction, will be presumed to have been regularly made until the contrary appears, and is conclusive on collateral attack.

INSANE PERSONS—RESTORATION OF SANITY—CONVEYANCE—MENTAL CAPACITY. Where a person who had been adjudged insane was discharged as restored to capacity and his guardian discharged and he thereupon sold real estate for \$2,500, the fact that two days later it was resold by the purchaser for \$4,100 does not indicate that the sale was invalid for want of mental capacity.

<sup>1</sup>Reported in 125 Pac. 957.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered November 22, 1911, upon findings in favor of the defendant, in an action of ejectment, after a trial to the court. Reversed.

*Hathaway & Alston*, for appellants.

*Williamson, Williamson & Freeman*, for respondent.

Gose, J.—This is a suit in ejectment. There was a judgment for the defendant. The plaintiffs have appealed.

The respondent pleaded affirmatively, that he was adjudged insane and committed to the asylum in this state in the month of November, 1908; that it had not since been judicially determined that he has recovered his reason; that at the time he conveyed the property to the appellants' grantor, he was, and for several years had been, incurably insane and incompetent to transact his ordinary business, and that the appellants had knowledge of his mental infirmity at the time they purchased the property. The appellants in their reply traversed the new matter in the answer, and alleged affirmatively that, in February, 1909, in the superior court of Pierce county, an order was entered appointing a guardian of the respondent's estate, upon the ground that he was insane and incompetent to manage his affairs; that the guardian qualified and took possession of the property of his ward; that on the 24th day of January, 1910, the respondent had recovered his reason, and that the said court then entered an order confirming the guardian's report, discharging the guardian, exonerating his bondsmen, and adjudging that the respondent had fully recovered from his mental affliction. The trial court found all the issues in favor of the respondent.

The facts are as follows: The respondent was committed to the asylum on November 2, 1908. On February 6, 1909, a guardian of his estate was appointed. On January 22, 1910, he was paroled, and at the time of the trial in November, 1911, was still at large. On January 24, 1910, an order was entered in the superior court of Pierce county,

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discharging the guardian and reciting that the respondent had recovered his reason. On January 26, the respondent gave one Miller written authority to sell the property in controversy for \$2,500, and agreed to pay him a commission of five per cent in case of a sale. On February 2, Miller procured a purchaser at the price stated, and on that day the respondent conveyed the property and received the purchase price. Two days later, the purchaser sold and conveyed the property to the appellants for \$4,100. The order appointing the guardian recited, that the respondent had property which needed the care and attention of some fit and proper person, and that the respondent was "confined in the hospital for the insane" in this state. None of the orders in the record indicate the degree or character of the respondent's insanity. The report of the guardian alleged that the respondent had been paroled upon the order of the superintendent of the hospital where he was confined, and that there was no necessity for the continuance of the guardianship. There is appended to the report a statement subscribed by the respondent, to the effect that he had examined the account and vouchers, that he approved them, and that he had received from his guardian all personal property belonging to him. The order of discharge recites, that the estate had been fairly and legally administered; that the guardian had turned over to the ward all the personal property belonging to the estate; that the guardian be discharged and his bondsmen exonerated; and that the respondent had "fully recovered from his mental affliction."

The oral testimony is all to the effect that the respondent was competent to manage his business affairs at all times subsequent to his parole. Miller, the man who sold the property, testified that the respondent lived in Tacoma; that he came to his office at Everett and signed the contract authorizing him to make the sale; that the respondent stated that the house was "run down" and needed repairs; that taxes would soon be due; that there were sewer assessments;

that he estimated the total of such expenses and said that the property was not paying, and that he would rather sell it; and that he further said that he did not feel that the city would grow. A Mr. Olson testified that he had known the respondent for ten or twelve years; that just before he made the sale he requested witness to sell the property; that witness asked him what price he wanted, and that the respondent said that, if he would sell it for \$2,600, he would pay him a commission, and that he appeared all right mentally. On December 20, 1909, about a month before his parole, the respondent wrote Miller as follows:

"Ft. Steilacoom, Wash., Dec. 20th, 1909.

"Mr. F. J. Miller. Your letter at hand. I am well at present and have been in good health. Work in the Kitchen Department and am quite a heavy weight. I hope to have the pleasure of seeing you soon, only wish I could come to see you on Christmas, but I expect to be at home soon in Tacoma, then I can come and see you, in regard to property, also would be glad to see you very much.

"I wish you a Merry Christmas and a Happy New Year.

"Respt. J. B. Winter."

On February 11, nine days after he made the sale, he again wrote Miller, saying:

"Tacoma, Washington, Feb. 11, 1910.

"Mr. F. J. Miller, Hewitt St., Everett, Wn.

"Dear Sir: Through the recent land deal made by you in disposing of my property in Everett, I have had lots of trouble, and the deal I made is void according to the law. I had no right to make this sale, as I was not fully released from the hospital for the insane at Steilacoom. This property was sold for about one-half its value and the court will say that I must get this property back or get the real value for it. If I dont get it the court will appoint a guardian for me and do it in that way, and I dont want that done. I am under the supervision of the court and under the protection of the state, and I will have to get this matter adjusted right. Yours truly, J. B. Winter."

Our statute in reference to the discharge of one who has



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been adjudged insane, Rem. & Bal. Code, § 1671, is as follows:

“Whenever the court shall receive information that such ward has recovered his reason, he shall immediately inquire into the facts, and if he finds that such ward is of sound mind, he shall forthwith discharge such person from care and custody; and the guardian shall immediately settle his accounts and restore to such person all things remaining in his hands belonging or appertaining to such ward.”

It will be observed that the statute makes no provision for notice to the ward or to any other person. The respondent, however, contends that the ward must be brought before the court in some manner before it acquires jurisdiction to hear and determine his mental condition. It is elementary law that adversary rights cannot be determined without affording an opportunity to be heard to the party whose rights are to be affected. But the question arises, Is an adjudication that a person has recovered his reason an adversary proceeding? We think not. The appointment and qualification of the guardian gave the court general jurisdiction over the estate of the ward. The jurisdiction continued until the ward recovered his reason, at which time the right to manage the estate by the court or the guardian ceased. *Meeker v. Mettler*, 50 Wash. 473, 97 Pac. 507. The statute contemplates that the court shall conduct such inquiry as it deems proper; that is, inquire into the facts and determine accordingly.

The cases cited by the respondent do not hold that notice to the ward or to his next of kin is jurisdictional, but only that expediency demands that such notice should be given or that the ward be brought before the court during the hearing. Moreover, we can see no reason why a court may not accept the resignation of a guardian, or discharge him upon his own application without notice to the ward. The question of the settlement of the guardian's account is quite a different thing. It is in its very nature an adversary pro-

ceeding, and as such requires a preliminary notice. We think that both the ward and the guardian were legally discharged.

We have assumed in the foregoing discussion that the hearing was had in the absence of the ward. The record is silent upon this question. In the *Meeker* case we held that an adjudication that a ward had attained his majority, he being personally present in court, was conclusive upon a collateral attack. The presumption always is that a court of general jurisdiction has proceeded regularly until the contrary is made to appear, where the subject-matter of the litigation is within its jurisdiction. *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887; *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131. It will also be presumed that every step necessary to acquire jurisdiction has been taken. 11 Cyc. 691, 692. Where a court of general jurisdiction has jurisdiction of the subject-matter of the action in which the judgment is pronounced, jurisdiction of the parties will be presumed. *Galpin v. Page*, 18 Wall. 350.

"Every presumption not inconsistent with the record is to be indulged in favor of jurisdiction." *Applegate v. Lexington etc. Min. Co.*, 117 U. S. 255.

We conclude that the guardian was legally discharged; that the respondent was under no legal restraint when he executed the deed; and that he was then mentally competent to manage his own business affairs. The fact that the property was sold at an enhanced price a few days later is not an unusual occurrence in real estate transactions. It is common knowledge that the market value of property responds quickly to changing conditions, and that the judgment of men differs widely upon the question of value. The judgment is reversed, with directions to enter a judgment for the appellants.

PARKER, CROW, and CHADWICK, JJ., concur.

[No. 10145. Department One. August 21, 1912.]

GREAT NORTHERN RAILWAY COMPANY, *Appellant*, v. PUBLIC  
SERVICE COMMISSION OF WASHINGTON *et al.*,  
*Respondents*.<sup>1</sup>

RAILROADS—REGULATION—SPUR TRACKS—ORDER OF RAILROAD COMMISSION—REVIEW. A railroad company is bound by an order of the railroad commission ordering the construction and maintenance of a spur track to serve a warehouse, and cannot have the same reviewed on certiorari on the theory that the order was a continuing one, where the company complied with the order by building the spur at the shipper's expense, which was paid, and took no appeal; Laws 1911, p. 597, § 87, providing that on appeal the superior court may in its discretion restrain or suspend the order *pendente lite*.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 14, 1911, quashing a writ of certiorari to review an order of the public service commission for a spur track to a warehouse. Affirmed.

*F. V. Brown* and *F. G. Dorety*, for appellant.

*Merritt, Oswald & Merritt*, for respondent Mohler Union Warehouse Company.

Gose, J.—This is an appeal from an order quashing a writ of review and dismissing the action. The history of the case is as follows. On July 13, 1911, the respondent Mohler Union Warehouse Company, a corporation, hereafter called the respondent, filed a complaint with the public service commission, alleging that it was operating a grain warehouse at the town of Mohler, in this state, at a point adjacent to the appellant's right of way, and that the appellant refused to run a spur track to its warehouse and to give it shipping facilities; and prayed that citation issue and that a hearing be had. On July 25, pursuant to notice, a hearing was had before a member of the public service commission. On

<sup>1</sup>Reported in 125 Pac. 948.

August 28 the commission filed its findings. On September 9, an order was entered by the commission, requiring the appellant to make the necessary survey and set the stakes for a spur track from its main line to the respondent's warehouse, requiring the respondent to do the necessary grading under the direction of the appellant's engineer, and requiring it to execute a bond in the sum of \$2,000, conditioned that upon the construction of the track it would pay to the appellant the sum of \$1,556, the agreed cost of the improvement. It was further ordered that the appellant, within ten days after it received notice that the grading had been completed, should proceed to construct the spur track, and that it should complete it within five days thereafter. The order further provided that, within twenty days after the completion of the spur track, the respondent should pay to appellant the sum of \$1,556, and that upon such payment the bond should be cancelled. By agreement of the parties, a certified check for that amount was accepted and is still held by the appellant in lieu of the bond. It is admitted that, within the time limited by the order, the appellant constructed the spur track, connected it with its main track, and proceeded to furnish switching service to the respondent. Thereafter and on October 5, the appellant applied for and was granted a writ of review by the superior court of Spokane county. Upon the facts stated, upon the motion of the respondent, the writ was quashed and the action dismissed.

The appellant contends that it was error to dismiss the case, because the order of the court requires the performance of services upon the part of the appellant of a continuing and permanent nature. In support of this view it cites the following cases: *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *United States v. Trans-Missouri Freight Ass'n.*, 166 U. S. 290; *Boise City Irr. & Land. Co. v. Clark*, 131 Fed. 415; *State v. Moore*, 23 Wash. 276, 62 Pac. 769; *Commonwealth v. Hall*, 8 Pick. 440.

The *Southern Pacific Terminal* case was a suit to enjoin

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an order of the Interstate Commerce Commission requiring the appellant to desist, on or before a fixed date and for a fixed period, from granting an undue preference to one Young, a shipper of cotton seed products. It was contended that the appeal should be dismissed because the time fixed in the order had expired, and the case was moot. The motion was denied on the ground that the order might be the basis of further proceedings, and that the questions involved in the orders were usually continuing.

In the *Freight Association* case, some of the defendants had entered into a traffic agreement under the name of "Trans-Missouri Freight Association." The defendants asked that the appeal be dismissed, on the ground that the association had been dissolved by a vote of its members after the entry of the judgment. In denying the motion the court observed that the object of the appeal was two-fold, viz., the dissolution of the association and the restraining of the defendants from continuing in a like combination. It was said that the mere dissolution of the association was not the most important object of the litigation, but that:

"The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future."

In the *Boise City* case, there was a motion to dismiss the appeal on the ground that the period for which the water rate was fixed had expired. This was denied, on the grounds, (1) because the rates once fixed continue in force until changed as provided by law, and (2) because of the propriety of deciding some questions of law which might serve to guide the municipal body when again called upon to act in the matter. In the *Moore* case it was observed that the object of the litigation, viz., the certification of the nomination of the relator, could still be carried out. In the *Hall* case it was held that an involuntary payment of an award of

damages in an eminent domain proceeding by a corporation, so that it could enter upon the land and save its franchise, was not a ground for quashing a writ of certiorari.

The public service commission act (Laws 1911, p. 597, § 87), provides that the superior court, "in its discretion, may restrain or suspend" in whole or in part the operation of the commissioners' order *pendente lite*. The appellant did not apply for a suspension of the order. It is plain that the discretion here vested in the superior court is not an arbitrary discretion, but a sound judicial discretion to be exercised as the justice of the particular case demands. The appellant chose to comply with the order, and to make the physical improvement at the expense of the respondent. If it were now permitted to review the proceedings of the commission and to reverse the order, the physical connection which the respondent has paid for would be rendered valueless. It has not appealed from the order, and no reason is suggested, and none occurs to the court, why it is not bound by it. The argument made, that the order is in its nature a continuing one, is measurably true. There is no doubt that it contemplates both a physical connection between the main line of the appellant's road and the respondent's warehouse, and the future maintenance thereof, together with switching accommodations. This, however, cannot overcome the effect of the other acts mentioned. We think, in view of the fact that the spur track has been run out at the expense of the respondent, and that no application was made for an order of supersedeas, the appellant is precluded from continuing the litigation.

While the case at bar has some features analogous to the questions involved in the *Southern Pacific Terminal* case and the *Boise City* case, we are of the opinion that the application of the principles there announced would be a flagrant injustice to the respondent.

The judgment is therefore affirmed.

MORRIS, PARKER, CROW, and CHADWICK, JJ., concur.

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[No. 10380. Department One. August 21, 1912.]

W. H. RINGEL, *Plaintiff*, v. RACHAEL NEWMAN *et al.*,  
*Defendants and Cross-Appellants*.<sup>1</sup>

**MECHANICS' LIENS—MATERIALMEN—DUPLICATE STATEMENTS TO OWNER—NECESSITY.** Where a contractor for a building defaulted and went into the hands of a receiver, and the receiver and the agent of the owner notified a subcontractor for the tile and mantel work to proceed with the performance of its subcontract, thereby recognizing and adopting the same, the subcontractor need not give the owner duplicate statements of materials furnished, as it is not a materialman, within the meaning of Rem. & Bal. Code, § 1133, providing that no lien for materials shall be enforced unless duplicate statements shall be sent to the owner of all materials furnished to any person or contractor, that section having no application to materials furnished direct to the owner on a contract made by the owner's agent.

**SAME—DUPLICATE STATEMENTS—SUFFICIENCY.** The duplicate statement of all materials or supplies furnished to any person or contractor, required by Rem. & Bal. Code, § 1133, to be delivered to the owner, need not specify the prices charged therefor, but is sufficient if it shows the kind and quality of the materials furnished.

Cross-appeals from a judgment of the superior court for Spokane county, Sullivan, J., entered October 25, 1911, upon findings favorable to part of the plaintiffs, in an action to foreclose mechanics' liens. Reversed on plaintiff's appeal and affirmed on defendant's appeal.

*Campbell & Goodwin*, for claimants Mowbray-Pearson Company and Empire Tile and Mantel Company.

*W. W. Zent*, for claimant Lamb.

*Peacock & Ludden*, for claimant Mosso-Berry Electrical Construction Company.

*Cain & Macdonald*, for defendant Newman.

PARKER, J.—The plaintiff and cross-complainants in this action seek foreclosure of their several lien claims for ma-

<sup>1</sup>Reported in 125 Pac. 943.

terial and labor furnished by them respectively and used in the construction of a building for the defendant. A trial before the court resulted in a decree foreclosing certain of the claimed liens and in the denial of the foreclosure of others. Appeals have been taken by the defendant, and also by certain of the claimants who were denied foreclosure. The controversies are only between each claimant and the defendant, there being no contest of priority or otherwise between the several claimants.

In October, 1910, C. H. Moller and E. Z. Little, copartners doing business as Empire Tile & Mantel Company, entered into a contract with the Pettifer Construction Company, defendant's contractor for the construction of the building, whereby they agreed to do all of the tile and mantel work in the building for the sum of \$1,000. At the time of the commencement of this work, they gave notice of the making of their subcontract with the Pettifer Construction Company, and of the commencement of the work thereunder, to J. D. Newman, the son and agent of defendant having in charge the construction of the building for her; but they never furnished to him or to the defendant any itemized statement of the materials used in carrying out their subcontract. About the time of the commencement of the work under this subcontract, the Pettifer Construction Company became involved and went into the hands of a receiver. Thereafter and before any material part of the subcontract work was done, both the receiver and the agent of the defendant directed Empire Tile & Mantel Company to proceed with the work in pursuance of their subcontract. The trial court denied foreclosure of the lien claimed for a balance due upon this work, and Empire Tile & Mantel Company have appealed therefrom. The grounds of the denial of foreclosure by the trial court was that no itemized statement of the material and labor furnished had been given to the owner under Rem. & Bal. Code, § 1133. In view of the manner in which this subcontract was recognized by the defendant through her agent,



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and his joining with the receiver in directing Empire Tile & Mantel Company to proceed with the work, it became in effect a contract with the owner. Under our decision in *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177, Empire Tile & Mantel Company were not materialmen, within the requirement of § 1133, and were not required to give the defendant any further notice of the work or material furnished in the construction of the building, in view of the knowledge of their contract and directions to proceed thereunder on the part of defendant through her agent. It is but fair to the trial court to state that this decision was rendered by this court after the entering of the decree in this case. The decision of the trial court refusing foreclosure of the claimed lien of the Empire Tile & Mantel Company is reversed, with directions to enter a decree of foreclosure therefor for the sum of \$500, with legal interest, that being the conceded amount of the balance due upon their claim.

The defendant has appealed from so much of the decree of the trial court as awarded the foreclosure of the lien claim of C. A. Lamb, who furnished material for the construction of the building to the Pettifer Construction Company. Lamb furnished an itemized statement of the materials furnished by him to the defendant, but the statement so furnished did not show the price he charged or was to receive for such materials. It is contended by counsel for defendant that the failure to specify the price or the prices of such materials in the statement so furnished renders it fatally defective as a basis for a lien claim, and that the trial court erred in foreclosing the lien claim for that reason. The statute in force at that time required only that the owner shall furnish a "statement of all such materials or supplies delivered," etc. Rem. & Bal. Code, § 1133. That section is silent as to the statement specifying the price of such material. We are of the opinion that the furnishing of a statement showing the kind and quantity of materials furnished is a sufficient compliance with the statute, and it appears to

have been complied with by Lamb to this extent. The decree is therefore affirmed, in so far as it foreclosed this lien claim. This disposes of all the law questions presented by the briefs of counsel.

Other appeals involve only questions of fact. We have carefully read all of the evidence which has been called to our attention bearing upon these questions of fact and deem it sufficient to say that we are convinced therefrom that the trial court was fully warranted in its disposition of all such claims. The decree is reversed in so far as it refused foreclosure of the lien claim of Empire Tile & Mantel Company; and in so far as it disposes of all the other claims it is affirmed.

MOUNT, GOSE, MORRIS, and CHADWICK, JJ., concur.

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[No. 10381. Department One. August 21, 1912.]

CARVER-SHADBOLT COMPANY, *Respondent*, v. G. C. KLEIN,  
*Appellant*.<sup>1</sup>

**SALES—BREACH BY VENDEE—MEASURE OF DAMAGES.** Where, upon a breach by the buyer of a contract to purchase hogs, the market price went down, and the seller used due diligence and made as advantageous sales of the remainder as the circumstances would permit, both as to the time and the price obtained, the measure of damages is sufficiently fixed by the difference between the contract price and the price obtained, plus his expense in feeding the hogs beyond the time he had agreed to do so; as it is a fair conclusion from his diligence that his loss was no greater than if he had sold at the market price on the day of the breach.

Appeal from a judgment of the superior court for Franklin county, Neill, J., entered April 8, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

*Moulton & Henderson*, for appellant.

*Parker & Richards* and *H. B. Noland*, for respondent.

<sup>1</sup>Reported in 125 Pac. 944.

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PARKER, J.—This is an action to recover damages which the plaintiff alleges resulted to it from the breach of a contract upon the part of the defendant, by which contract he agreed to purchase from it 202 hogs. A trial before the court without a jury resulted in findings and a judgment in favor of the plaintiff for damages in the sum of \$466.51. The defendant has appealed.

The court found in substance as follows: On September 22, 1909, respondent sold to appellant 202 hogs, at the agreed price of 8½ cents per pound, f. o. b. at Wapato station, in Yakima county. He then paid upon the purchase price \$1,643.48, and took 86 of the hogs, leaving 116 in possession of respondent. Appellant having failed to take and pay for the 116 hogs, on the 4th day of November respondent notified him that, if he did not take the hogs within three days, it would sell them and charge the loss and any damage and expense incurred by it to him. Under the original contract of sale, respondent was to feed the 116 hogs until October 19, and between that time and November 4, appellant still signified his intention of taking the hogs and did not repudiate the contract prior to November 4. On November 18, respondent sold 86 of the hogs at 7¼ cents per pound, and on November 23, it sold the remaining 30 at 8 cents per pound, realizing on these sales \$294.07 less than it would have realized had it received 8½ cents per pound, the agreed price in its sale contract with appellant. During the period from the giving of the notice by respondent to appellant that it would sell the hogs if he did not take them, until the hogs were sold by respondent, it incurred an expense in feeding the hogs amounting to \$172.44. The damages awarded to respondent by the court was the aggregate amount of this sum and the \$294.07 difference between the contract price and the amount respondent sold the hogs for. The hogs were sold by respondent at the market price. It is apparent that the court proceeded upon the assumption

that the following facts also appeared from the evidence, though no specific findings were made thereon. The weight of the 116 hogs did not materially change between the time of giving the notice on November 4th and the sale of them by respondent, and in making the sales of the hogs respondent used due diligence and made as advantageous sales as the circumstances would permit, both as to time and the price he procured at those sales.

The argument of counsel for appellant is addressed largely to the question of the sufficiency of the evidence to establish the facts found by the court, and the facts which we have noticed must have been assumed by the court as proven by the evidence. We have carefully read all of the evidence and deem it sufficient to say that we are convinced that the trial court was fully warranted thereby in proceeding upon the theory that the facts were proven substantially as we have above briefly narrated.

The arguments of counsel for appellant upon law questions have but little application to these facts; but to other facts which they contend were shown by the evidence. It is insisted, however, that even these facts fail to disclose any proper measure of damage as a basis for the judgment; it being argued that the market value of the hogs, on the 7th day of November, which under the facts would be the date of the breach of the contract by appellant, does not appear, and that the only proper measure of damage would be the difference between the market value on that day and the agreed contract price. We think, while there was no direct evidence to show the market value on that day, it is a fair conclusion from the evidence showing due diligence on the part of respondent in selling the hogs, both as to time and price obtained, that the amount of respondent's loss, made up of his loss in price and his expense in feeding the hogs thereafter, was no greater than it would have been had it then made sale of the hogs for whatever it could have gotten on

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that day. It is evident that respondent's diligence made its damage as small as possible.

The judgment is affirmed.

MORRIS, CROW, CHADWICK, and GOSE, JJ., concur.

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[No. 10295. Department Two. August 21, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. IRENE BAKER,  
*Appellant*.<sup>1</sup>

INDICTMENT AND INFORMATION—ROBBERY—ATTEMPT—LANGUAGE OF STATUTE. An information charging an attempt to commit robbery is not insufficient in that the physical acts done towards the commission of the offense are not set forth, where it follows the language of Rem. & Bal. Code, § 2418, defining robbery and charges the defendant with an attempt to do the precise thing recited in the statute as constituting the crime.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. It is error without prejudice for the court, in a prosecution for attempt to rob, to inadvertently instruct the jury that the crime of attempted robbery includes the lesser offense of grand larceny, where no finding was made thereon and the error did not enter into the verdict.

CRIMINAL LAW—EVIDENCE—RES GESTAE—SEVERAL DEFENDANTS—ACTS OF ONE. Where one of two robbers was immediately captured and given to the prosecuting witness to hold while the officer pursued the other, whereupon the first offered money to be allowed to escape and finally escaped, what was said and done while the other was absent is admissible as part of the *res gestae*, and also for the reason that there was concert of action between the two in the commission of the offense.

CRIMINAL LAW—EVIDENCE—ILLUSTRATIONS. It is not error to allow a witness who had been robbed to illustrate upon the person of another the position of the defendant's arms with relation to his person when his pocketbook was taken.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered March 14, 1912, upon a trial and conviction of attempted robbery. Affirmed.

<sup>1</sup>Reported in 125 Pac. 1016.

*Nuxum, Clark & Nuxum* and *Geo. H. Armitage*, for appellant.

*John L. Wiley, Robert L. McWilliams*, and *C. C. Dill*, for respondent.

FULLERTON, J.—The appellant was informed against by the prosecuting attorney of Spokane for the crime of attempt to commit robbery, the information, omitting the formal parts, reading as follows:

“Comes now the prosecuting attorney of Spokane county and charges the said defendants as follows:

“That they, Irene Baker and Bessie White, said defendants, and each of them, on or about the 5th day of December, 1911, in the county of Spokane and state of Washington, then and there being, did then and there unlawfully, feloniously, wilfully and with force and violence attempt to take from the person and immediate presence of one John Pharao, and against his will, certain personal property, to wit, a pocket-book and ten dollars in money, bills and currency of the value of ten dollars, said pocket book and money then and there being in the possession of and belonging to said John Pharao.”

The appellant interposed a demurrer to the information, based on the ground that it does not state facts sufficient to constitute a crime. The demurrer was overruled by the court, whereupon the appellant entered a plea of not guilty to the information; and on the issue thus joined a trial was had before a jury, which resulted in a verdict of guilty as charged in the information. The appellant was thereupon adjudged guilty by the court and sentenced to a term of years in the penitentiary. This appeal is from the judgment and sentence.

The appellant first contends that the information does not state facts sufficient to constitute a crime. It is said that to constitute an attempt to commit a crime there must appear to have been more than a mere design or intention to commit it, and hence the physical acts done towards the commission of the offense must be set forth in the indictment or informa-

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tion charging the offense, so that the court may know whether the law has been violated and that the accused may know to what he must make answer. Cases are cited from other jurisdictions which hold with this contention, and seemingly hold that informations and indictments in the form of the one in question do not sufficiently comply with the rule. *Hogan v. State*, 50 Fla. 86, 7 Am. & Eng. Ann. Cas. 139, and note 140.

But without reviewing these cases specially, we think that, under the liberal rules of criminal pleading enjoined by our statute, the information is sufficient. Robbery is defined by the statute (Rem. & Bal. Code, § 2418), as follows:

“Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years.”

An attempt is defined (Id., § 2264):

“An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.”

A comparison of the charge contained in the information with the language of the statute will show that the information follows the language of the statute and charges the defendant with attempting to do the precise things which are recited in the statute as constituting the crime. This is a sufficient charge under the general rules governing criminal

pleadings, and convictions for the crime of robbery itself have been sustained by this court where the overt act constituting the crime was charged in language the same as or similar to that used by the pleader in the present instance. *State v. Johnson*, 19 Wash. 410, 53 Pac. 667; *State v. Smith*, 40 Wash. 615, 82 Pac. 918; *State v. Brache*, 63 Wash. 396, 115 Pac. 853.

If it be a sufficient charge of the overt act constituting the offense when charging the crime of burglary itself to say that the defendant, "did then and there unlawfully, feloniously and wilfully and with force and violence take from the person of" another certain described personal property the personal property of that other, it ought to be a sufficient charge of the overt act when charging an attempt to commit the crime of burglary to charge the overt act in similar language. We think it is, and that the information in the present case is not faulty in the respect to which complaint is made. *State v. Womack*, 4 Wash. 19, 29 Pac. 939; *State v. Wright*, 9 Wash. 96, 37 Pac. 313; *State v. Levan*, 23 Wash. 547, 63 Pac. 202; *State v. Davis*, 43 Wash. 116, 86 Pac. 201; 1 Bishop, Criminal Procedure, § 611.

In the opening statement of his charge to the jury, the trial judge used this language, namely: "The information in this case charges the defendants, Irene Baker and Bessie White, with the crime of attempted robbery, which includes in it also the lesser offense of grand larceny." It is objected that the concluding clause of the statement is error, because it is manifest that the charge of grand larceny cannot be included in a charge of attempted robbery, whatever the fact may be as to its being included within a charge of robbery itself. The statement is doubtless subject to the criticism the appellant puts upon it, but we cannot think it reversible error, nevertheless. The statement was clearly an inadvertence on the part of the trial judge, and the jury could not have understood it otherwise. At any rate, no finding was made by them based on the instruction, and no



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prejudice resulted to the appellant therefrom. The error, therefore, did not enter into the verdict, but on the contrary was cured thereby.

The attempted robbery occurred on one of the streets of the city of Spokane. As the defendant was going from the down town district to his home, he met the women named in the information, who spoke to him, saying something he did not understand. He stopped apparently to ascertain what was wanted, and was immediately assaulted by them, and a purse containing ten dollars in money was taken by one of them from his hip pocket. In the tussle that followed, the purse was dropped by the person taking it, and was picked up by the prosecuting witness. Just then the assailants discovered a policeman approaching, and started to run away. The appellant's companion was caught immediately by the policeman and given to the prosecuting witness to detain while the policeman captured the appellant. Immediately after the policeman started his pursuit, the woman the witness was detaining made certain proposals and committed certain acts, which the witness detailed as follows:

"Q. What happened next with you and Bessie? A. I held the woman by the collar. Q. Did you have any conversation? Mr. Armitage: I object as the defendant was not present. Objection overruled—exception. Q. What did she say? A. She told me to let her go and she would give me a dollar. Q. What did you say? A. I said you won't get loose from me. Q. Then what happened? A. I was looking around to see what became of the other one and she had meantime pulled out her hat pins and trying to make for my face. Mr. Armitage: Objected to as incompetent and immaterial. The transaction did not occur in the presence of the defendant and I object. Overruled—exception. Q. What did you do? A. I let her go. Q. And what happened? A. She turned to run and I grabbed her hair. Mr. Armitage: This is all over my objection. The Court: Yes. Q. What next? A. I grabbed her by the hair, but the hair and hat came off. Q. Where did she go? A. I stayed in front of the house and waited for Bradley. Q. Did you see Bradley

again? A. Bradley came afterwards with the other woman. Q. With Irene Baker? A. Yes."

It is thought that it was not competent to show these acts and statements on the trial of the appellant because occurring out of her presence. But we think them matters proper to be shown the jury. They seem to be sufficiently closely connected with the crime committed as to be part of the *res gestae* and admissible for that reason; but if it were otherwise, it was admissible on the authority of the case of *State v. Williams*, 62 Wash. 286, 113 Pac. 780, and the cases therein cited, as it clearly appears there was concert of action between the defendants in the commission of the crime charged.

While the prosecuting witness was testifying concerning the manner in which he was assaulted by the women, he was permitted by the court to illustrate on the person of the examiner the position of the woman's arms with relation to his person when his pocketbook was taken from his pocket. This was objected to on the part of the defendant on the ground that it was a "theatrical exhibition," and consequently improper. But if the record correctly describes the occurrence, there was nothing in it that was in any way censurable. The illustration was simply in aid of the witness' description of the manner of the attempted robbery and was proper under all circumstances. It is true the illustration as made cannot be preserved in the record other than by description, but this is not a sufficient reason for excluding it as evidence. As every practitioner knows, there is much that is proper to go before the jury as evidence, or as explaining the evidence, that cannot be preserved in the record. It has been frequently held, for example, that the jury may properly be permitted to view the scene of a crime, that they may view the subject of the crime where identity is in question, that a witness may be permitted to illustrate by rapping on a table or by motion of his hands the rapidity with which gun shots were fired; that a witness may properly be per-

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mitted to illustrate with his own voice the tone in which certain words were spoken by another; that noises claimed to have been made for the purpose of alarm may be repeated before the jury in order that the jury may determine whether they were in fact made; although it is at once evident that in none of these instances can the particular thing given in evidence be preserved in the record, other than in some more or less general way by description. There was, therefore, no error in the ruling made with reference to the illustration in question.

We conclude that no reversible error was committed at the trial, and that the judgment should stand affirmed. It is so ordered.

MOUNT, CROW, ELLIS, and MORRIS, JJ., concur.

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[No. 10124. Department Two. August 21, 1912.]

J. C. PARSONS, *Respondent*, v. PACIFIC SURETY COMPANY,  
*Appellant*.<sup>1</sup>

PRINCIPAL AND SURETY—BONDS—BUILDING CONTRACT—CONDITIONS—WAIVER. Stipulations in a surety bond guaranteeing a building contract that the owner should give immediate notice in writing to the president of the surety company at its principal office of any defaults by the contractor in the performance of the work, and that the owner should retain a certain percentage of the amounts due the contractor, are modified and waived, where, upon the contractor's inability to pay the materialmen out of estimates certified by the architect, it was agreed that the owners should pay all claims approved by the surety company, and this was done on the written approval of the company's resident attorney in fact, he having authority to represent the surety company.

SAME—WAIVER BY AGENT—AUTHORITY. It sufficiently appears that a resident attorney in fact for a surety company had authority to waive conditions in an indemnity bond, where he was its accredited representative in that city and executed the bond in the name of the company, and his general authority was not questioned

<sup>1</sup>Reported in 125 Pac. 954.

except by mere denials in the pleadings, no evidence being offered thereon by the defendant.

**SAME—CONTRACTOR'S BOND—LIABILITY—DEMURRAGE CHARGES—CONDITIONS.** Failure to promptly notify a surety company of defaults by a contractor in the performance of a building contract, as required by stipulations in the bond, relieves the surety company from liability for demurrage charges on failure to complete the building on time.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered July 5, 1911, upon findings in favor of the plaintiff, in an action upon a surety bond guaranteeing a building contract. Reversed.

*Cannon, Ferris & Swan*, for appellant.

*McCarthy & Edge* and *H. H. Cleland*, for respondent.

FULLERTON, J.—On July 25, 1910, the respondent, Parsons, and the defendant Washington Construction & Building Company entered into a contract by the terms of which the defendant agreed to erect a building for the respondent at the city of Spokane, according to plans and specifications agreed upon, for the contract price of \$21,079. By the terms of the contract, the building was to be completed on or before November 15, 1910, under a penalty of \$10 per day for each and every day its completion was delayed beyond that time. To secure the faithful performance of the contract, the contractor executed a bond to the respondent, with the appellant Pacific Surety Company as surety, in the sum of \$10,600. The bond contained a number of stipulations in addition to those found in the contract the performance of which it was intended to secure, among which was a stipulation to the effect that the surety should be immediately notified of any breach of the contract by the contractor or of any act on his part or that of his agent or employees which might involve a loss for which the surety might be liable, immediately after the occurrence of such act shall come to the knowledge of the owner, which notification "must be given in writing to the president of said surety, at its principal

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office in San Francisco, California.” The bond also contained conditions to the effect that the owner would notify the surety before making the last payment on the contract; and the contract provided that a certain percentage of the amount of the installments due the contractor should be withheld until the final completion of the contract. The surety company, at the time of the execution of the bond, was represented by one H. W. Newton, its attorney in fact, who resided in the city of Spokane.

The contractor defaulted in the performance of his contract, leaving the building in an incompleated condition. The owner notified the surety of the default and demanded that the surety complete the building itself. On its refusal so to do, the owner partially completed the building himself, at a cost exceeding the contract price, and after a delay of a month beyond the time fixed in the contract for its completion. This action was brought to recover the excess cost paid for the construction of the building, alleged to be the sum of \$422.60; the sum of \$300 as demurrage for failure to complete the building by the time agreed upon in the contract; and for omissions in the plans made by the contractor in the sum of \$114.50. The respondent recovered in the court below for the full amount claimed, and the surety company appealed.

The appellant contends, first, that it is not liable upon the bond in any sum, because of breaches of the conditions thereof by the respondent himself; and second, that, if the court adjudges it to be so liable, it is not liable in the sum found due by the trial judge. It bases its claim of nonliability on the fact that the respondent did not give notice in writing to the president of the surety company, at its principal office in San Francisco, California, of the defaults made by the contractor in the performance of the building contract; that he did not withhold, when making the installment payments on the contract, the percentage he was permitted to retain under the terms of the contract, and that he did not notify the

company before making the last payment to the contractor under the contract.

But we think there was a subsequent modification of the contract with respect to the matters here mentioned. It is gathered from the evidence that the contractor was unable to pay the materialmen who were furnishing materials for the construction of the building out of the estimates certified to him by the architect from time to time, and that they threatened to file liens upon the incompleted building unless they were paid; that, to meet these demands, it was agreed between the contractor and the respondent that the respondent would pay all such claims as should meet with the approval of the surety company; that the contractor thereupon made out written statements of the amount due the several materialmen, presented them to H. W. Newton, who marked them approved over the name of the surety company signed by himself as its attorney in fact. The claims were thereupon presented to respondent who paid to the several materialmen the amounts stated therein to be due them. This form of making payments extended over a considerable period of time, and practically one third of the contract price of the structure was paid in this manner. It is plain, therefore, that if the attorney in fact approving the bills had authority to represent the surety company in this behalf, there was a waiver of the several conditions of the bond thought to have been violated by the respondent.

On this latter question, we think it is fairly shown by the record that the attorney in fact did have such authority. The evidence on which the conclusion rests is somewhat involved, and need not be reproduced here. It is sufficient to say that the agent was the accredited representative of the surety company for the city of Spokane; that he was its attorney in fact; that he executed in name of the company the bond which gave rise to the controversy; and that the surety company has not questioned his general authority other than by

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mere denials in its pleadings; on the trial it contented itself with the case made by the respondent.

As to the amount of the recovery found by the court, we are content with the amount allowed as paid in excess of the contract price, and the amount found necessary to a completion of the building, but we think the court erred in making an award for demurrage. As we read the record, the respondent did not inform the agent at Spokane of the fact that the contractor did not complete the building within the time named in the contract until some days after he had actually breached the contract in that respect. This we held in *Monro v. National Surety Co.*, 47 Wash. 488, 92 Pac. 280, would relieve the surety company from liability on the demurrage clause in the contract, although not from its liability for other obligations not connected with this particular clause or affected thereby. *Heffernan v. United States Fidelity & Guaranty Co.*, 37 Wash. 477, 79 Pac. 1095; *Trinity Parish v. Aetna Indemnity Co.*, 37 Wash. 515, 79 Pac. 1097; *Denny v. Spurr etc.*, 38 Wash. 347, 80 Pac. 541.

We have not overlooked the fact that the appellant contends that an item of \$232.45 was paid by the respondent without either the certificate of the supervising architect or the approval of the surety company's agent. But while it is true the claim was not indorsed or approved by the agent, we think it clear from the testimony that it had its approval in fact. The essential requirement was that it be approved, not that it be approved in any particular manner.

The judgment is reversed, and the cause remanded with instructions to enter a judgment in favor of the plaintiff below for the amount demanded in his complaint, less the sum of \$300 sought to be recovered for delay in the completion of the building.

MOUNT, MORRIS, ELLIS, and PARKER, JJ., concur.

[No. 10128. Department Two. August 21, 1912.]

OLD REPUBLIC MINING COMPANY, *Appellant*, v. FERRY  
COUNTY *et al.*, *Respondents*.<sup>1</sup>

**TAXATION—FORECLOSURE — SALE—NOTICE — DESCRIPTION OF PROPERTY—MINING CLAIMS.** Upon a collateral attack of a tax foreclosure sale of mining claims, a notice of sale describing the claims as the R. lode and the C. lode, with the number of acres in each, when the government patents named them as the R. lode and the C. "Fraction," is sufficient, in the absence of a showing that the claims could not be found from the description given.

**TAXATION—FORECLOSURE PROCEEDINGS—PRESUMPTIONS.** The presumption being in favor of the regularity of tax proceedings, an assessment of two mining claims *in solido* instead of in parcels, as required by law, will not be found from the mere fact that the certificate of delinquency was for the total amount.

**PROCESS—SUMMONS BY PUBLICATION—FORM—SUBSTANTIAL COMPLIANCE.** A summons for publication requiring the defendant to appear within sixty days after a specified date, is substantially in the form prescribed by Bal. Code, § 4878, which requires appearance to be within "sixty days after the date of the first publication of this summons, to-wit, within sixty days after.....day of.....;" the omission of reference to the first publication being immaterial where the date thereof itself is given.

**SAME—NOTICE—PROOF.** Proof that a notice of a tax sale was duly given as required by law may be shown by recitals in the county treasurer's return of the sale.

**SAME—FORECLOSURE PROCEEDINGS—COLLATERAL ATTACK—DEED—EVIDENCE OF REGULARITY.** In a collateral attack upon a tax foreclosure sale, the deed is conclusive of the regularity of the proceedings as against mere omissions in the recitals contained in the record, in view of the statute making the deed *prima facie* evidence that the sale was conducted in the manner required by law.

**SAME—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX—WAIVER.** A tender of taxes, made by statute a prerequisite to a suit to set aside a tax sale, cannot be excused by an allegation that the county had proclaimed and stated that any tender on account of taxes for the year in question would be refused; no officer of the county having any authority to make any such waiver.

<sup>1</sup>Reported in 125 Pac. 1018.



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Opinion Per FULLERTON, J.

Appeal from a judgment of the superior court for Ferry county, Peck, J., entered November 22, 1910, dismissing an action to set aside a tax sale, upon sustaining a demurrer to the complaint. Affirmed.

*John Salisbury* and *E. C. Macdonald*, for appellant.

*John W. Mathews*, for respondents.

FULLERTON, J.—This action was brought for the purpose of setting aside a sale of certain mining claims, made by the county of Ferry in a general foreclosure proceeding instituted to enforce the payment of delinquent taxes. A general demurrer was interposed to the complaint, and sustained, and on the election of the plaintiff to stand thereon, judgment to the effect that it take nothing by its action and for costs was entered against it. This appeal followed.

In support of its appeal, the appellant makes four principal contentions, namely: (1) that the sale is invalid for want of a sufficient description of the property sold; (2) that the property was assessed *in solido*, whereas the law requires that each separate parcel be assessed separately; (3) that the summons in the foreclosure proceedings failed to comply with the requirements of the statutes and was therefore void; and (4) that it does not appear from the record that the county treasurer gave the statutory notice of the time and place of the foreclosure sale.

With reference to the description, it appears that in the assessment rolls and the foreclosure proceedings, the claims were described as the "Republic Lode" and the "Cecelia Lode"; each description being followed by a statement of the number of acres contained therein. The names used were the names given the claims in the government's patents; except that the Cecelia Lode was called therein the "Cecelia Fraction." But we think, nevertheless, the description sufficient to identify the properties. It must be remembered that the appellant is attacking the judgment of foreclosure

collaterally, and all intendments are in favor of the regularity of the judgment. Therefore, in the absence of a showing that these claims could not be found and located from the description given, the court will presume that they can be so found and located, and this is all that is required of a description of property in a deed of conveyance. *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250; *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139.

Whether there is any foundation for the claim on which the second objection is based, the record does not disclose, as the manner in which the property was assessed in this respect is not shown. In the certificate of delinquency the "total amount" of the assessment is given in one lump sum, and it may be that under certain circumstances we would presume that the valuation on the assessment roll was in similar form; but we will not so presume where the effect of the presumption is to invalidate the assessment. As we have stated, the presumption is in favor of the regularity of the proceedings, and they will be presumed valid unless the contrary clearly appears on the face of the record.

The service of the summons upon the appellant in the tax foreclosure proceedings was made by publication. The summons as published was directed to the appellant, and summoned and required it "to appear within sixty (60) days after the eleventh day of August, A. D. 1906, and defend the above entitled action, or pay the amount due upon the certificate," etc. The statute (Rem. & Bal. Code, § 9253) provides that, where service of the summons in a tax foreclosure proceeding is made by publication, the summons shall contain "a direction to the owner, summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due." The form given to which the published summons must substantially comply is as follows:

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In the superior court of the state of Washington for the county of.....

....., Plaintiff,

vs.

No.....

.....,Defendant.

The state of Washington to the said (naming the defendant or defendants to be served by publication):

You are hereby summoned to appear within sixty days after the date of the first publication of this summons, to wit, within sixty days after the.....day of....., 1...., and defend the above entitled action in the above entitled court, and answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff....., at his (or their) office below stated; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed with the clerk of said court. (Insert here a brief statement of the object of the action.)

.....,

Plaintiff's Attorneys.

P. O. address, ....., county....., Washington.

It is objected to the published summons in the instant case that it does not contain a direction to the defendant "summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication." In other words, it is contended that the summons in order to be valid must follow the form prescribed by the statute, and summon the defendant "to appear within sixty days after the date of the first publication, to wit: within sixty days after the ..... day of ..... and defend the above entitled action, . . ." A similar objection was made to the summons in the case of *Stubbs v. Continental Timber Co.*, 49 Wash. 431, 95 Pac. 1011, answering which we said:

"The published summons, it will be noticed, while sufficiently regular in other respects, omits the words 'after the date of the first publication of this summons, to wit,' which precede the actual date given as prescribed in the form, and it is this omission that is thought to render the summons void. We are of the opinion, however, that the omission is not fatal to the judgment. No doubt it was the purpose of the framers of the statute to provide a summons so definitely worded

that the defendant summoned would know with certainty the time within which no default could be entered against him, but the wording of the statute makes it clear that they did not intend to prescribe a particular form of words with which the idea should be expressed to the exclusion of all others. The requirement is that the summons shall be substantially in the form given, not that it shall be a literal transcript of that form. The summons published is as definite as the prescribed form in fixing the time within which the defendant must appear. It summons the defendant to appear within sixty days from a given date, and this is all that form given does or can do. In point of definiteness it adds nothing to the summons to insert preceding the date the words, 'after the date of the first publication of this summons, to wit.' These words but describe an event which may or may not have happened on the date given. To ascertain that fact the defendant must resort to the initial copy of the paper in which the summons is being published, or he must inspect the proofs of publication after they are returned and filed in court. The same sources of information are equally open to him whether the words omitted here are or are not included in the summons as published. The insertion of the words, therefore, cannot instruct nor can their omission mislead the defendant, and, since only a substantial compliance with the statute is required, it would seem to be sacrificing the substance to the shadow to hold that the omission of the words is fatal to a judgment entered thereon."

This case is direct authority in support of the sufficiency of the summons in the case at bar, and as we are satisfied with the rule there announced we hold the present summons sufficient in substance and form.

By the code (Rem. & Bal. Code, § 9260) it is provided that all sales of property under a tax foreclosure judgment shall be made on Saturday between the hours of 9 o'clock in the morning and 4 o'clock in the afternoon, after first giving notice of the time and place where such sale is to take place for ten days successively by posting notice thereof in three public places in the county where the land lies one of which shall be in the office of the county treasurer. The statute prescribes no form for making and preserving a

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record of such sales, and it is alleged in the complaint that it does not appear that the required notice was given in the case now before us. But the treasurer's return of the sale of the premises does appear in the record. In the return it is recited that the sale was made on December 1, 1906, between the hours of 9 o'clock in the forenoon and 4 o'clock in the afternoon, "after first giving due legal notice of the time and place of such sale by posting notice thereof for ten days successively in three public places in 'Ferry County,' one of which was at my office . . ." If it be necessary in order to hold the sale valid to find in the record proofs that the statute was complied with in respect to giving notice of the time and place of sale, we think the return supplies such proof. But it is not necessary that this fact appear of record in order to sustain the sale in this proceeding. In addition to the fact that in a collateral attack all presumptions are in favor of the record, it is provided by statute that the deed executed by the county treasurer to lands sold for taxes shall be *prima facie* evidence in all controversies and suits in relation to the right of the purchaser to the real estate thereby conveyed of the fact "that the sale was conducted in the manner required by law." Rem. & Bal. Code, § 9267. This is conclusive of the regularity of the proceedings as against any mere omissions in the recitals contained in the record.

The foregoing considerations lead us to conclude that the appellant's contentions are without force when considered upon their merits. There is, however, another reason why the appellant cannot prevail in this particular suit, even were the contentions considered all well taken. It is provided by statute that no action or proceeding shall be commenced or instituted in any court in this state for the recovery of property sold for taxes unless the person desiring to institute such action or proceeding shall first pay or cause to be paid, or shall tender to the officer entitled under the law to receive the same, all taxes, penalties, interest, and costs

justly due and unpaid on the property sought to be recovered. Rem. & Bal. Code, § 955. In this case no tender was made to the county of the taxes, penalties, interest and costs for which the property was sold. On the contrary, the appellant instead of making the tender required, sought to excuse such a tender by alleging "that the defendant county has given out, proclaimed, and stated unto the plaintiff that any tender of taxes, interest, penalties and costs made by your orator on account of the taxes assessed for the year 1900, or any other years, would be refused and would not be accepted; that the said county further asserted that it was the owner in fee of said mining claims, subject only to the terms and conditions of the lease hereinbefore referred to, and that your orator has no interest in said mining claims or either of them." This allegation is wholly inadequate to show a waiver by the county of the statutory tender. It is impossible that the county could make such a declaration. The officer to whom a tender would be proper and to whom it is made could in his official capacity refuse to accept the tender, but he cannot in advance of such tender waive the right of the county to have a tender made its proper officer as a condition precedent to submitting itself to an action. It is true this court has held that a private individual may waive a tender required under a similar statute. But the individual represents only his own interests, and may waive such statutory rights given him as he chooses. The officer, on the contrary, represents the county, and his power in his representative capacity is only such as the statute gives him. There is no statute conferring upon him the power to waive a tender made by statute a condition precedent to the right to maintain an action against the county.

The judgment appealed from is affirmed.

MOUNT, ELLIS, MORRIS, and PARKER, JJ., concur.

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Opinion Per Curiam.

[No. 10027. Department Two. August 21, 1912.]

C. S. Hood, *Respondent*, v. JOHN GERRICK *et al.*,  
*Appellants*.<sup>1</sup>

CONTINUANCE—PLEADINGS—AMENDMENT. It is not error to refuse a continuance asked on account of a trial amendment to the complaint, stating in more detail matters that had been stated generally in the original pleading, where the amendment was not very material and did not affect in any way the issues on the merits or require different proofs to meet it.

PHYSICIANS AND SURGEONS—SERVICES—CONTRACT. Upon a general contract of hire to furnish such medical and surgical treatment for an employee as the physician may find necessary, a second operation is within the contract, if it was necessary for the recovery of the patient.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered June 19, 1911, upon findings in favor of the plaintiff for services performed, etc., after a trial to the court. Affirmed.

*Milo A. Root*, for appellants.

*Neterer & Pemberton*, for respondent.

PER CURIAM.—One Larry George, while in the employment of the appellants as foreman superintending the construction of a railroad bridge, met with an accident. Some person, in no way connected with the appellants, called the respondent to attend the injured man. He responded to the call, gave the injured man medical and surgical aid, procured temporary hospital quarters, and engaged the services of a professional nurse. Mr. George's injuries were of a serious nature. His right leg was crushed from the knee down, requiring immediate amputation; his left leg between the knee and the ankle, his right arm between the elbow and the shoulder, his right clavicle, and two of his ribs, were broken; he received an injury to the spine, severe contusions on vari-

<sup>1</sup>Reported in 125 Pac. 956.

ous parts of the body, and a severe scalp wound. Neither of the appellants were present at the place of the accident at the time it occurred. Some five days thereafter, John Gerrick appeared at the place where the injured man was being cared for, and according to the respondent, made an arrangement for his future care. The respondent testified that he explained to Gerrick the desperate nature of George's injuries, the necessity of keeping a nurse with him at all hours of the day and night, the number of nurses that would be required for that purpose, and the cost of their services; that Gerrick knowing these facts arranged with him to continue the care and treatment of the injured man, employ such assistants as he found necessary and promised that the appellant firm would pay the expense thereof. The respondent continued his treatment until the appellant left the hospital, rendering bills to the appellants for his services, a small part only of which were paid. The respondent sued for the services of himself and the nurses he employed for the entire period of service, those performed before the appearance of John Gerrick, as well as those performed afterwards. The appellants denied liability for any part of the services. The issue was tried by the judge sitting without a jury, and resulted in a judgment in favor of the respondent for the value of his services subsequent to the time of the purported hiring by John Gerrick, and for the services of the nurses subsequent to that time. This appeal is from the judgment rendered.

During the course of the trial, the court granted the respondent permission to amend his complaint, and refused to continue the cause on the motion of the defendant after such leave had been granted. The appellant has assigned error upon both of these rulings, but we find nothing in them that calls for a reversal. The amendment itself was not very material. It simply alleged with more detail matters that had been stated too generally perhaps in the original pleading. It did not affect in any way the issues on the merits of the



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claim and required no different proofs to meet its allegations than were required to meet the allegations of the original complaint. There could be, therefore, no error in allowing the amendment nor surprise on the part of the defendants warranting a continuance.

The contention is made that the evidence is insufficient to support the judgment as a whole, and it is complained particularly that the recovery is too large. But on both of these questions we think the findings of the trial court are justified. No recovery was allowed for the services of the plaintiff and the nurses prior to the time the agreement was had between John Gerrick and the respondent, and the respondent in his proofs had some difficulty in segregating the value of his services at that precise line, but his evidence shows services performed subsequent to that time of the reasonable value allowed by the court. It is objected that a charge of \$125 made for a second operation on George's broken leg was not within the terms of the contract proven, but we think it was. The contract of hire was general, it was to furnish the injured man with such medical and surgical treatment as in the judgment of the respondent was necessary for his recovery; and if the respondent found it necessary to perform another operation upon his leg—and the proofs show it was so necessary—he has the same right to perform and recover for that service as he has for any other medical or surgical service rendered him. The judgment will stand affirmed.

[No. 10425. Department Two. August 21, 1912.]

HANNAH M. DREW, *Appellant*, v. H. P. BOUFFLEUR,  
*Respondent*.<sup>1</sup>

CANCELLATION OF INSTRUMENTS — DEEDS — FRAUD AND DURESS — EVIDENCE — SUFFICIENCY. A claim of fraud and duress in securing a deed from the plaintiff in a settlement is not established, where there was evidence that she took the advice of counsel and executed the deed after being advised not to do so; that defendant's threatened foreclosure of a mortgage placed her in no danger, and that she accepted the benefits accruing to her through the settlement and had not offered to return the same.

ACKNOWLEDGMENT — IMPEACHMENT — EVIDENCE — SUFFICIENCY. A mere denial that a grantor did not acknowledge a deed she had signed is outweighed by the fact that she went before the notary for the purpose of acknowledging it, where there was other evidence that she actually acknowledged it.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered October 9, 1911, upon findings in favor of the defendant, in an action for cancellation, after a trial to the court. Affirmed.

*L. H. Prather*, for appellant.

*John C. Kleber*, for respondent.

PER CURIAM.—The appellant brought this action against the respondent to procure the cancellation, on the ground of want of consideration, duress and fraud, of a quitclaim deed executed by herself to the respondent. From the record it appears that one Benjamin F. Smith died, leaving a tract of land, one-half of which he devised to the appellant, and one-half to certain other parties. The estate was indebted in a considerable sum, and to pay the same the land was sold by the executor named in the will, at public sale. The respondent became the purchaser at the sale, paying for the land the amount of the obligations against the estate, some \$700,

<sup>1</sup>Reported in 125 Pac. 947.

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taking the title thereto in his own name. The purchase was made pursuant to a written agreement between the appellant and respondent, the precise terms of which are in dispute, the writing itself having been lost while in the possession of the respondent. The respondent's version of the agreement is that he undertook to purchase the land at the executor's sale for a sum sufficient to pay the obligations against the estate, make an advancement to the respondent sufficient to clear a mortgage on her home place, and after these sums had been repaid to him, to divide the land evenly with the appellant. The appellant, on the other hand, contends that the respondent agreed to pay a thousand dollars for a half interest in the land, the money to be used in payment of the debts of the estate, and certain liens, consisting of a mortgage and taxes, then on the appellant's home property; and that she was to have, in addition to the money necessary to pay the liens, an undivided half interest in the property free from incumbrances. The precise terms of the agreement being in dispute, the parties settled their difficulty by a new agreement. The appellant gave to the respondent a quitclaim deed for her interest in the land purchased from the estate, and he in turn procured for her a cancellation of the mortgage against her homestead, and gave her acquittances for certain moneys he had advanced to her in the payment of taxes and for her personal use.

It is this quitclaim deed that the appellant sought to set aside in this action. The duress and fraud alleged is the taking advantage of the necessities of the appellant thus compelling her to enter into the agreement of settlement. She alleges, and testified at the trial, that the respondent threatened to foreclose the mortgage on her home unless she acceded to his terms of settlement; that she had a sick daughter living with her; and that this threat so far disturbed the daughter's peace of mind as to render her condition dangerous, compelling the appellant to comply with the request in order to save the daughter's life. But the evidence does not

justify this claim. It was shown that she took the advice of counsel just prior to making the settlement, and was advised by him not to enter into it, as her contentions if they could be proven would prevent a foreclosure of the mortgage and she stood in no danger of losing her home by reason thereof. It was shown also that the daughter was a mature woman, with a family of her own, capable of being made to understand that no danger lay in a foreclosure suit if the appellant's version of the contract was correct. Moreover, the appellant has accepted the benefits accruing to her from the settlement, no part of which has she offered to return.

The appellant next insists that she did not in fact acknowledge the quitclaim deed, and that the officer's certificate thereon to that effect is false. But this claim is also without merit. She bases her charge of want of acknowledgment on the assertion that she refused to state to the notary taking the same that she executed the deed freely and voluntarily for the uses and purposes therein mentioned. But aside from the fact that she went before the notary for the purpose of acknowledging it, there is evidence that she actually did acknowledge it, sufficient to outweigh her denial.

The judgment is affirmed.

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[No. 9929. Department Two. August 21, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v.

THELMA JOHNSON *et al.*, *Appellants*.<sup>1</sup>

BAIL—FORFEITURE—VACATION OF JUDGMENT—DISCRETION. Rem. & Bal. Code, § 2233, providing that, if, upon a stay of execution against sureties on a bail bond, the person bailed shall be produced in court before expiration of the stay, the court may vacate the judgment against the bail on such terms as may be just and equitable, imposes a judicial discretion on the trial court, and not one that can be exercised arbitrarily.

<sup>1</sup>Reported in 126 Pac. 56.

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**SAME—ABUSE OF DISCRETION—GOOD FAITH OF BAIL.** Under Rem. & Bal. Code, § 2233, providing that the court may vacate a judgment on a bail bond, if the person bailed is produced in court before the expiration of a stay of execution, it is an abuse of discretion to refuse to vacate the judgment, where, on a charge of grand larceny, there had been several adjournments of the trial of accused, who was advised by her attorney that the state was indifferent about prosecuting, that she might leave the city, and that he would notify her if the case was set for trial; and it appeared that she had no notice of the trial, and none could be given her, that her bail acted in good faith and spent considerable money in attempting to locate her without success; and after judgment forfeiting the bail bond, accused, upon learning of the same, returned and surrendered herself to the court before expiration of the stay.

**SAME—JUDGMENT ON BAIL BOND—ENTRY—DATE—STAY.** The clerk's journal entry of a judgment forfeiting a bail bond, is not the judgment governing the sixty-day stay of execution thereon within which the accused could be produced, where it was informal and did not specify the amount, being in effect an order of default, and was so construed by the prosecuting attorney, who six weeks later entered a formal judgment for the amount of the bond; as the latter would, in any event, have the effect of vacating the earlier one and estop the state from denying that it was the judgment for all purposes.

Appeal from a judgment of the superior court for King county, Main, J., entered February 18, 1911, denying a motion to vacate a judgment forfeiting a bail bond. Reversed.

*J. L. Finch* and *Jay C. Allen*, for appellants.

*John F. Murphy*, *Hugh M. Caldwell*, and *H. B. Butler*, for respondent.

ELLIS, J.—The defendant Thelma Johnson was charged, by information in the superior court of King county, with the crime of grand larceny. She was admitted to bail in the sum of \$1,000, the defendants Charles H. Walker and Rosa Walker his wife, and E. H. Williams and Effie Williams his wife, being her bondsmen. The case was set for trial on December 6th, 1910. Upon the request of the defendant Thelma Johnson, the case was continued not to a day certain but to be subsequently set. On December 15, 1910, the case

was set for trial on January 3, 1911. On that day, it was called for trial, and the defendant failing to appear, an order of default and forfeiture of the bail bond was entered and judgment granted against the defendant and her sureties, the clerk's minutes reading as follows:

"This cause comes on regularly for hearing this day. Defendant fails to appear. On motion of deputy prosecuting attorney H. M. Caldwell, court orders bail bonds forfeited and grants judgment against the defendant and sureties."

On February 18th a formal written judgment was entered against the defendants and her bondsmen for \$1,000, the penalty of the bond, at the instance of the plaintiff. Thereafter the judgment was stayed for sixty days by the giving of a bond as provided in § 2232, Rem. & Bal. Code. The defendant, as soon as she learned of the judgment, surrendered herself to her bondsmen, who on April 12, and within the sixty days from the entry of the formal written judgment, produced her before the court. On June 17, the defendant and her bondsmen on proper notice moved the court to set aside and vacate the judgment. From an order denying that motion, the defendants have appealed.

The evidence at the hearing showed that, at the time of the continuance, the then attorney for the defendant Johnson informed her that the state was somewhat indifferent as to a further prosecution of the case, and that she might then leave the city of Seattle, and he would notify her when the case was again set for trial; that she desired to leave because she had been ordered to do so by the police department of the city; that it was agreed that her attorney would notify a certain friend of hers who would know of her whereabouts; but that the friend soon after also left Seattle without advising either the defendant or her attorney of the fact; that the defendant had no knowledge that the case was set for trial on January 3; and that her attorney being unable to find her friend, was unable to find and notify the defendant of that fact. The evidence further showed that, on learning

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of the default of the original defendant, her bondsmen employed attorneys, and prosecuted diligent search for her, spending \$325 in their efforts to locate her; that she, from an independent source, learned that the case had been called and the bond forfeited, and at once came to Seattle and surrendered herself to her bondsmen.

The trial court, in ruling upon the motion to vacate the judgment, stated that he believed, and would so find, that both the attorneys and the bondsmen had acted in good faith, and that neither of them had in any manner meant to, nor had they in fact trifled with the court in the premises, but that he believed that to grant the application would in effect set at naught the efforts of the state to prosecute criminal cases in which defendants had been admitted to bail, and would make bonds in criminal cases of no force and effect, and would tend to thwart the ends of justice and he could see no reason why defendant could not and should not have kept her counsel advised of her whereabouts so that she could have been notified that the case was set for trial.

The statutory provisions pertinent to the questions here involved are as follows:

“If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the default to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited.” Rem. & Bal. Code, § 2090.

“In criminal cases where a recognizance for the appearance of any person, either as a witness or to appear and answer, shall have been taken and a default entered, the recognizance shall be declared forfeited by the court, and at the time of adjudging such forfeiture said court shall enter judgment against the principal and sureties named in such recognizance for the sum therein mentioned, and execution may issue thereon the same as upon other judgments.” Rem. & Bal. Code, § 2231.

“The parties, or either of them, against whom such judgment may be entered in the superior or supreme courts, may

stay said execution for sixty days by giving a bond, with two or more sureties, to be approved by the clerk, conditioned for the payment of such judgment at the expiration of sixty days, unless the same shall be vacated before the expiration of that time." Rem. & Bal. Code, §2232.

"If a bond be given and execution stayed, as provided in the last preceding section, and the person for whose appearance such recognizance was given shall be produced in court before the expiration of said period of sixty days, the judge may vacate such judgment upon such terms as may be just and equitable; otherwise execution shall forthwith issue as well against the sureties in the new bond as against the judgment debtors." Rem. & Bal. Code, § 2233.

Unquestionably by the last quoted section, the vacation of the judgment is made a matter largely within the discretion of the trial court. That discretion, however, is not to be arbitrarily exercised. It is a judicial discretion. It is the manifest policy of the statute to encourage the giving of bail in proper cases, rather than to hold in custody at the state's expense persons accused of bailable offenses. The court should so administer cases arising under this statute as to give effect to this manifest policy. While the excuse given by the original defendants for not appearing did not appeal to the trial court as a good one, the fact that she did voluntarily return and surrender herself ought to have strong weight in her favor. It tended to show good faith on her part. We would be slow to disturb the court's ruling, however, if the original defendant alone were concerned, but her bondsmen were even more vitally interested than she was. The court found that neither of the bondsmen nor their attorneys had in any manner meant to nor had they in fact trifled with the court, but that they had acted in good faith. It is not questioned that they honestly and persistently and at considerable expense endeavored to find the defendant, nor is it questioned that they finally produced her in court. The purpose of the bail bond was accomplished. Under the court's finding as to their good faith, which we think was amply supported by the evidence, the judgment should have



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been vacated. The court's announcement would justify no other course if in fact the original defendant was produced within the period of sixty days provided by the statute.

The respondent contends that the clerk's minutes of the order of default and forfeiture of the bail bond and for judgment against the defendant and her sureties on January 3d constituted the judgment, and that the defendant not having been produced within sixty days from that date, the court had no power to vacate the judgment. This position is not tenable. In the first place the clerk's entry was evidently not intended as a judgment. It was for no specific amount. It was in effect an order of default and forfeiture, and a direction that judgment be entered thereon. The prosecuting attorney so construed it by preparing and having entered a formal judgment for \$1,000 one month and a half later. In the second place, there cannot be two subsisting judgments against the same parties for the same breach of the same bond. Even if the clerk's entry of January 3d had been sufficient to leave no doubt that it was intended as a judgment for the penalty of the bond, as directed by the statute, the court in entering the formal judgment at the instance of the judgment creditor in effect vacated the earlier one. The new judgment having been entered at the instance of the state, the state is now estopped to deny that it is the judgment of the court for all purposes. *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287; *Jemo v. Tourist Hotel Co.*, 55 Wash. 595, 104 Pac. 820, 30 L. R. A. (N. S.) 926.

The case of *Woody v. Seattle Electric Co.*, 65 Wash. 539, 118 Pac. 633, relied upon by the respondent is not pertinent. There the unsuccessful party sought to extend the time for taking an appeal by having a formal judgment entered, though the clerk's minutes contained every element of a final judgment. The decision in that case is based upon our holding in *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264, which is clearly distinguished from the situation here presented in the case of *Jemo v. Tourist Hotel Co.*,

*supra*, at page 598, where it is said referring to the *Chilcott* case:

“We held that the defeated party could not extend the time for taking an appeal by having a subsequent judgment entered. It was not the intention of the court to modify the rule announced in the *Herzog* case, as is shown by the reasons stated in the opinion and the fact that the case was not referred to. We think that, where a judgment has been entered by the clerk and later a motion for a new trial made and denied and a new judgment entered by the court upon the motion of the successful party, he is not only estopped to deny that it is the final judgment, but that in effect it vacates and supersedes the former judgment.”

Under the rule so announced, we must hold that the judgment entered on February 18th is the only subsisting judgment on the bond. The defendant was produced in court by her bondsmen within the statutory period from that date.

The order appealed from is reversed, and the cause is remanded with the direction to vacate the judgment.

MOUNT, MORRIS, and FULLERTON, JJ., concur.

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[No. 10259. Department Two. August 21, 1912.]

EILERS MUSIC HOUSE, *Respondent*, v. ORIENTAL COMPANY,  
*Appellant*.<sup>1</sup>

SALES—CONDITIONAL SALES—BREACH—LIQUIDATED DAMAGES—RETENTION OF PAYMENTS. Under a conditional sales contract of a pian orchestra, reserving the title until payment of the price and providing that any payment made prior to breach might be retained by the seller as liquidated damages, the seller may retain the installments paid and sue to recover possession on an admitted breach in subsequent payments; and such action being to enforce and not rescind the contract, waiver therein of claims for damages or rent for detention does not affect plaintiff's right to retain payments credited on the contract.

<sup>1</sup>Reported in 125 Pac. 1023.

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**SAME—RESCISSION—RECOVERY OF PRICE.** Money paid on a conditional sales contract can only be recovered by rescinding the contract and returning the property or by proving damages.

**SAME—BREACH—LIQUIDATED DAMAGES OR PENALTY.** Upon a conditional sale of a pianorchestra, stipulating that the sums paid may be retained as liquidated damages, if the buyer fails to pay for the instrument, or removes or attempts to remove or sell it, the conditions named are not of such a differing degree of importance that the measure of damages could not be appropriate for each; and hence the stipulation will not be construed as a penalty or security for the damages actually suffered.

**SAME.** A stipulation in a conditional sales contract of a pianorchestra that any payments made prior to breach may be retained as liquidated damages, is not to be treated as a penalty because such damages increase as the performance continues; since the vendor's actual damages increase the longer he is kept out of possession and by the increased deterioration of the property.

**EVIDENCE—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.** Evidence of verbal warranties alleged to have been made prior to the execution of a written contract of sale are inadmissible as contradicting the terms of the writing.

**SALES—ACTION FOR PRICE—COUNTERCLAIM—DAMAGES.** A counterclaim for damages by reason of alleged defects in an instrument purchased fails where the purchaser did not rescind, but kept the instrument, and failed to show that he had suffered any loss or damage by reason of the defects.

**APPEAL—REVIEW—COSTS—HARMLESS ERROR.** An objection that a cost bill was not properly itemized and verified is unavailing in the supreme court, in the absence of a showing that the costs allowed were not necessarily expended.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 6, 1911, upon findings in favor of the plaintiff, in an action of replevin, after a trial to the court. Affirmed.

*Howard O. Durk*, for appellant.

*Wright & Kelleher, Charles S. Gleason, and Edward W. Allen*, for respondent.

**ELLIS, J.**—On March 15, 1909, the defendant purchased from the plaintiff, upon a written conditional sale contract, a mandolin pianorchestra, for an agreed price of \$1,900.

The defendant was credited with \$393.65 for amounts paid upon other instruments formerly purchased by it and returned in exchange, and with \$200 cash paid at the making of the contract. By the contract the defendant agreed to pay the balance of the purchase price in monthly installments of \$100 each. It was agreed that the title to the instrument should remain in the vendor until payment, and that, if the vendee should fail to make any payment at the times mentioned, or should remove, attempt to remove, or sell the instrument, the vendor should have the right to take possession thereof and retain all payments as liquidated damages for breach of the agreement and as payment for the use of the instrument. The contract also declared that "Any agreement other than that expressed on the face of this contract will not be recognized." The defendant paid the installments maturing on the 15th day of April, May, and June, but refused to pay the installment due July 15, 1909. The plaintiff demanded a return of the instrument, which being refused, it brought this action and obtained possession by statutory process.

The complaint set out the contract in full, claimed the plaintiff's right to possession by virtue of the breach, alleged demand by plaintiff for possession on August 9, 1909, and the refusal to deliver the same by the defendant. It alleged damages for the unlawful detention in the sum of \$500, and that the value of the use of the instrument was \$10 a day.

The answer admitted the execution of the contract, denied the alleged damages for unlawful detention, denied the allegation that the value of the use of the instrument was \$10 a day, and set up an affirmative counterclaim for the recovery of the money paid on the purchase price amounting to \$893.95, on the ground that the instrument failed to meet certain alleged verbal warranties made by the plaintiff at and prior to the time of the execution of the written contract.

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The reply put in issue the affirmative allegations of the answer.

At the trial, the defendant admitted that the plaintiff was entitled to judgment for the possession of the instrument. The plaintiff admitted that it had credited the defendant with \$598.95 mentioned in the contract as allowed upon the purchase price, and \$300 for the three monthly installments which had been paid. The plaintiff waived any claim for damages or rent of the instrument accruing subsequent to its demand for possession.

The defendant moved for judgment on these admissions, for the amount credited on the contract and demanded in its counterclaim. The motion was denied. The defendant then offered evidence in support of its counterclaim. The trial court refused to admit evidence of any verbal representation or warranties made by the plaintiff prior to the execution of the contract, on the ground that the contract was complete in itself and such warranties to be available would have to be found in the written instrument. The court, however, did admit evidence of certain defects in the instrument on the ground that there was an implied warranty that the instrument was adapted to the purpose for which it was sold. The evidence showed that a certain automatic device was so defective that the instrument frequently failed to properly furnish music until adjusted. No evidence was offered to show that the defendant had suffered any monetary loss or injury to its business by reason of this or any other defect in the instrument. Upon the conclusion of the defendant's evidence, the plaintiff moved to dismiss the counterclaim upon the ground that there was no evidence showing damages in any amount. The motion was granted and judgment was entered awarding to plaintiff the possession of the instrument. The defendant has appealed.

The appellant first assigns as error the denial of its motion for judgment at the close of the respondent's case. The argument, briefly, is that the respondent having admitted

that \$893.95 had been credited upon the contract, and having waived any claim for damages and rent for the detention of the instrument after demand for possession, and having neither asked for nor proved specific damages for the breach of the contract, and having procured possession of the instrument by replevin, it had no right to retain the money paid upon the contract. A sufficient answer to this argument is found in the nature of the action. It was an action to enforce the contract, not to rescind it. It was an action to recover possession of the chattel, not to recover damages for breach of the contract. Respondent had already received payment of damages by retaining, under the stipulation of the contract, the part of the purchase price which had been paid. The contract declared that any payments made prior to the breach might be retained as liquidated damages for the breach and as payment for the use of the instrument. The breach of the contract was admitted by the appellant. The respondent, having retained this money as liquidated damages for the admitted breach, could not claim any other damages for the breach or for the use of the instrument. If the stipulation for liquidated damages is to be held valid, the respondent was not required to prove that he suffered any damage. *Sanford v. First Nat. Bank of Belle Plaine*, 94 Iowa 680, 63 N. W. 459; *Little v. Banks*, 85 N. Y. 258; 13 Cyc. 105.

If the stipulation for liquidated damages was a valid stipulation, then the appellant could only recover the money paid upon the purchase price by rescinding the purchase for sufficient cause and voluntarily returning the instrument, or by proving damages in the amount paid upon the contract for failure of the instrument to perform the functions for which it was purchased. Appellant never sought to rescind the contract, but ratified and affirmed it by refusing to return the instrument, and at the time the motion was denied it had introduced no evidence in support of its counterclaim for damages for the alleged breach of warranty.

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The appellant further contends that the provision for liquidated damages should be treated as a penalty or security for the actual damages which the respondent could prove that it suffered from the breach of the contract. It is first argued that the several acts for which respondent might retake the instrument and retain the payments as liquidated damages, namely, failure to pay any installment, removal of the instrument, or attempt to sell or remove it, are so different in degree of importance that the same measure of damages could not be appropriate for each, and hence, the stipulation must be construed as a penalty or security for the damages actually suffered. It must be conceded on authority a sound rule that, where there are several acts to be performed or not performed in contemplation of the contract, widely varying in degree of importance, a stipulation for payment of the same amount as damages for the performance or nonperformance of each must be construed as a penalty. 1 Pomeroy, Equity Jurisprudence (3d ed.), § 443.

This contract however presents no such case. The vendee's failure to pay for the instrument, removal or attempt to remove or sell the instrument, are plainly of equal importance, since they lead to the same result. They would each constitute such a breach of the contract as to make a resumption of possession by the vendor absolutely necessary to his protection. Whatever breach forces that result, the damages consequent thereon are necessarily the same, hence, the same sum as liquidated damages if appropriate to either is appropriate to each of such breaches.

It is next argued that, inasmuch as the sum to be applied as liquidated damages constantly increases as the performance of the contract continues, the damages paid would be greater when the failure to perform was only partial than when the failure was complete. Again it must be conceded on sound authority that where the stipulated sum to be paid is the same or larger where the failure to perform is only partial as where the failure is complete, the stipulation will usually be

construed as a penalty. 1 Pomeroy, Equity Jurisprudence (3d. ed.), § 444.

This rule, however, cannot be applied blindly and without reference to the nature of the contract or without regard to the plainly expressed intention of the parties. The same eminent author, after stating this and other general rules, adds:

“There are undoubtedly numerous instances which cannot be easily referred to either of these rules; and this must be so almost as a matter of necessity. Since agreements are of infinite variety in their objects and in their provisions, and since the question of penalty or liquidated damages is always one of intention, depending upon the terms and circumstances of each particular contract, there must be many agreements which cannot be brought within the scope of any specific rule, and with which a court can only deal by applying the most general canon of interpretation.” 1 Pomeroy, Equity Jurisprudence (3d ed.), p. 747, § 445.

In the case here, it is manifest that the damage must be the greater the longer the vendor is kept out of possession and the longer the vendee has the use of the instrument. The longer the vendee keeps up his payments and retains the possession of the property the greater will be the deterioration of the property, and the longer will the vendor be deprived of its use and disposition by sale or rental. It seems clear that in such a case the fact that the sum fixed as liquidated damages increases as the actual damage increases is no ground for declaring the stipulation one for a penalty rather than for liquidated damages. The case is one in which the stipulation for liquidated damages is peculiarly appropriate. The actual damages, by deterioration of a delicate and highly complicated piece of machinery such as that here involved, could hardly be determined by evidence. The uncertainty inheres in the very nature of the subject-matter of the contract. The case falls within the two cardinal rules of construction laid down in Cyc. as follows:

“There are two excellent rules given for inferring that the



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parties intended the sum as liquidated damages: (1) Where the damages are uncertain, and not capable of being ascertained by any satisfactory and known rule, whether the uncertainty lies in the nature of the subject itself, or in the particular circumstance of the case; or (2) where from the nature of the case and the tenor of the agreement, it is apparent that the damages have already been the subject of actual and fair calculation and adjustment between the parties." 13 Cyc. 90.

The following language is peculiarly applicable to the case before us:

"In determining whether a sum claimed upon a breach of contract for sale is liquidated damages or a penalty, the court should look at the nature of the contract and the words and intentions of the parties; but such sums have usually been held liquidated damages for the reason that the damages sustained are in almost all cases uncertain and very difficult to estimate." 13 Cyc. 102.

The intention of the parties to stipulate for liquidated damages is so plainly expressed in the contract and the stipulation is so palpably appropriate to the very subject-matter of the contract that we are constrained to enforce the contract as written rather than by construction make a new one for the parties.

As said by the supreme court of the United States in *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642-662:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not *bona fide*, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

And again, in *United States v. Bethlehem Steel Co.*, 205 U. S. 105-119:

"The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out."

A review of the multitude of authorities cited by the appellant would avail nothing, since we conceive the principles above outlined controlling upon the facts of this case.

The court's refusal to admit evidence as to certain representations or warranties alleged to have been made by respondent prior to the execution of the written contract is assigned as error. The court said: "I sustain the objection to any representations made prior to the execution of this instrument. They ought to be embodied in the instrument." The ruling was correct. We find nothing in the case to take it out of the rule that express warranties must be found in the written instrument, which was freely executed by the parties. It cannot be added to nor varied by parol testimony as to antecedent negotiations. *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180.

We find no error in the dismissal of the appellant's counterclaim for lack of sufficient evidence. The court permitted proof as to the alleged defects in the machine as tending to show that it did not meet the implied warranty that it would fill the purpose for which it was intended. There was, however, neither evidence nor offer of evidence of any specific damages suffered by reason of such defects. The appellant having retained the instrument and having sought no rescission of the contract, was only entitled to such damages as he could prove. Having proved no damages, his counterclaim must fail.

Upon motion of the appellant, the trial court reduced the costs from \$140.50 to \$59.90. It is now urged that the cost bill was not properly itemized and verified. The objections are technical. We have uniformly declined to sustain such objections in the absence of some affirmative showing

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that the costs allowed were not necessarily expended. *Roeb-ling's Sons Co. v. Washington Alaska Bank*, 56 Wash. 102, 105 Pac. 174; *Hall v. Northwest Lumber Co.*, 61 Wash. 351, 112 Pac. 369; *Daniels v. Spear*, 65 Wash. 121, 117 Pac. 737; *Pillsbury v. Beresford*, 58 Wash. 656, 109 Pac. 193.

The judgment is affirmed.

FULLERTON, MORRIS, and MOUNT, JJ., concur.

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[No. 10408. Department Two. August 21, 1912.]

MAGGIE HICKS, *Respondent*, v. HANSEL HARRISON HICKS  
*et al.*, *Appellants*.<sup>1</sup>

**DIVORCE—DECREE—COLLATERAL ATTACK.** An action for a divorce and the division of community property, seeking also the annulment of a foreign divorce fraudulently obtained by the defendant, constitutes a collateral attack on such decree, the annulment of which is a mere incident to the primary purpose of the action.

**SAME—SERVICE OF SUMMONS—FRAUD.** A foreign decree of divorce, valid on its face, by a court of general jurisdiction, adjudicating a valid service of summons, is conclusive on collateral attack and cannot be impeached for fraud.

**DIVORCE—COMMUNITY PROPERTY—DIVISION—SUBSEQUENT ACTION.** Where a divorce obtained by a husband made no mention of community property, the title thereto vests in the parties as tenants in common; and the wife has a right of action for a division or in lieu thereof some provision for maintenance.

**SAME—SUBSEQUENT ACTION—LIMITATIONS—TENANTS IN COMMON.** A decree of divorce making no mention of community property is not an assertion of an adverse claim thereto; and as the husband holds possession as a tenant in common, limitations do not run against the wife's right of action for a division.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 17, 1912, upon findings in favor of the plaintiff, in an action for divorce and other relief. Reversed.

<sup>1</sup>Reported in 125 Pac. 945.

*J. P. Ball and Frank E. Green*, for appellants.

*Glen R. Metsker*, for respondent.

ELLIS, J.—The plaintiff and the defendant Hansel Harrison Hicks were married at Reno, Nevada, in August, 1892. They lived together in California until April, 1895, when the defendant went to Alaska where he has since resided. No children were born of the marriage. In March, 1904, the defendant Hansel Harrison Hicks brought an action for divorce against the plaintiff in the United States district court for Alaska, third division, and on May 2, 1905, procured in that court a decree of divorce which, after reciting that the defendant (plaintiff here) "was duly served with summons by publication as required by law," decreed as follows:

"Wherefore it is here ordered, adjudged and decreed that the marriage between the plaintiff, Hansel Harrison Hicks, and the said defendant Maggie Hicks, is dissolved and the same is hereby dissolved and the said parties are and each of them is freed and absolutely released from the bonds of matrimony and all the obligations thereof."

Some time in 1906, the defendant Hicks married Ida Allen, his co-respondent herein. On September 21, 1911, the plaintiff (respondent here) brought this action in the superior court of King county to procure a decree of divorce from the defendant Hansel Harrison Hicks, on the ground of desertion and infidelity, naming the other defendant as co-respondent. Both defendants were served personally with summons in King county. In this action the plaintiff sought to procure a division of property and also to have canceled and annulled the Alaska decree, upon the ground that it was entered without jurisdiction over the plaintiff herein, in that the summons was published upon a false and fraudulent affidavit, and that the publication of summons in the Alaska action and the decree founded thereon were void. The complaint alleged that, when he deserted the plaintiff, the defendant took with him \$1,100, all of which was community

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property, and \$600 of which was earned by plaintiff's labor, and that with this money as a capital he has since accumulated a large amount of property and has conveyed a large part of such property to the co-respondent.

The answer denied the principal allegations of the complaint, and set up, as affirmative defenses, estoppel of the plaintiff by her laches to question the Alaska decree, and that any attack upon that decree for fraud was barred by the statute of limitations. A trial was had to the court, which found facts substantially as set out in the complaint, and entered a decree declaring null and void the Alaska decree, and dissolving the marriage tie between the plaintiff and the defendant Hansel Harrison Hicks, and awarding the plaintiff judgment for \$2,500 for maintenance and support and \$250 as an attorney's fee. The defendants have appealed.

The appellants contend that the trial court erred in declaring the Alaska decree void. This contention must be sustained. The main purpose of this action was to obtain a decree of divorce and a division of community property, not simply to annul the Alaska decree. The annulling of that decree was a mere incident to the primary purpose of this action. This action is therefore a collateral attack upon that decree. 1 Black, Judgments (2d ed.), § 252; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757. That decree was valid upon its face. It was entered by a court of general jurisdiction. The subject-matter was within its jurisdiction. The complaint in this action alleges that, in the Alaska suit, an affidavit stated that the place of residence of the plaintiff here, defendant there, was unknown, and that her last known place of residence was San Diego, California. No irregularity in the affidavit is claimed. It is attacked solely as being false, a matter which could only be established by evidence outside of the Alaska record. The proof of the publication of summons appearing in that record is regular. The decree recites that the defendant was served by publication as required by law. This adjudication of valid service is as

conclusive as that upon any other question is the case as against collateral attack. *Peyton v. Peyton, supra*. As did the plaintiff in the *Peyton* case, the respondent here seeks to avoid the former decree as having been obtained by fraud. The following language there quoted with approval is equally applicable here:

"Fraud in procuring a judgment cannot be shown by the parties to such judgment, in any collateral proceeding." 1 Freeman, Judgments (4th ed.), § 132

It follows that the court erred in admitting evidence of matters outside of the record of the Alaska suit to impeach the decree, and in holding that decree void; and also erred in granting the decree of divorce in this action. The principles announced in the *Peyton* case are conclusive on these points.

But it does not follow that the respondent was entitled to no relief. The Alaska decree made no disposition of property, and contained no reference to the property rights of the parties. It was confined to a dissolution of the marriage tie. The complaint in this action set up facts which, if established by competent evidence, would entitle the respondent to a division of the property acquired as community property by the appellant prior to his obtaining the Alaska divorce, or in lieu thereof some provision for maintenance. That was a part of the relief sought in this action. A dissolution of the community by a decree of divorce which makes no mention of the property does not divest the title. The community being terminated, the community property becomes common property. Of necessity the title vests in the members of the former community as tenants in common. *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103.

The statute of limitations has no application to this phase of the case. During the coverture, the husband was entitled to the possession of the community property which he held, in a sense, as trustee for the community. When, by the dissolution of the marriage, the community property became property held in common, the possession of one was the pos-

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session of both. The divorce decree which made no mention of property was no assertion of an adverse claim upon the appellant's part. It was no such notice of an adverse holding or claim on his part as would set the statute in motion as against the respondent. She is still entitled to an equitable accounting.

The trial court awarded to the respondent \$2,500 for maintenance and support, but inasmuch as the cause was tried upon an erroneous theory, and that award was made as ancillary to a decree of divorce, we cannot say that, had the inquiry been confined to the issue of a division of the property or provision for maintenance, the same result would have been reached.

The judgment is therefore reversed, and the cause remanded for a new trial, with direction to permit the parties to so frame the pleadings as to present and try out this issue, and upon the evidence to make such a division of property or provision for maintenance as the equities of the case may warrant.

FULLERTON, MOUNT, and MORRIS, JJ., concur.

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[No. 10409. Department Two. August 21, 1912.]

ROY V. NYE, *Respondent*, v. F. G. MANLEY, *Appellant*.<sup>1</sup>

APPEAL — REVIEW — DISCRETION — CONTINUANCE. The refusal to grant a continuance will not be reviewed except for abuse of discretion.

CONTINUANCE—ABSENCE OF PARTY—DISCRETION. It is not an abuse of discretion to refuse a continuance, asked on account of the absence of the defendant, where it appears that the defendant in an action on promissory notes was absent in Alaska several months while the case was pending; that on June 24th the case was set for trial on September 26th, and later continued to October 5th and 9th; that defendant could have been reached by telegraph or mail and

<sup>1</sup>Reported in 125 Pac. 1009.

advised of the date of trial in time to attend, but he failed to keep his attorney posted as to his address or how to reach him.

**NEW TRIAL—GROUNDS.** Where it is not an abuse of discretion to refuse a continuance on account of the absence of a party, it is not an abuse of discretion to refuse a new trial asked on the same grounds; the showing of a meritorious defense not being alone sufficient.

Appeal from a judgment of the superior court for King county, Myers, J., entered October 10, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

*Kerr & McCord*, for appellant.

*Hughes, McMicken, Dovell & Ramsey* and *J. B. Joujon-Roche*, for respondent.

**ELLIS, J.**—This action was brought to recover the amount alleged to be due upon two promissory notes, executed and delivered by the defendant to the plaintiff, and also to recover the amount alleged to be due to plaintiff upon a certain written contract between plaintiff and defendant.

The answer set up in defense lack of consideration, fraud, duress, coercion, intimidation, and other unlawful means alleged to have been used by the plaintiff to induce the execution and delivery of the notes and contract.

On June 24, 1911, the case was set for trial on September 26, 1911, before Honorable J. T. Ronald, one of the judges of the superior court for King county. At the time the case was set for trial, the defendant was in Alaska, and had not returned to Seattle on the date set for trial. Upon application of his attorney, the cause was continued to October 5, and on that day again continued to October 6, when on application supported by affidavits of his attorney the cause was further continued to October 9, 1911. At that time, the defendant still being absent, application for a further continuance was made. This was resisted by the plaintiff and was denied by the court. The defendant thereupon applied



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for a change of judges, alleging disqualification on the part of Judge Ronald to try the cause on the ground of prejudice against the defendant and his attorney. The change was granted, and in the afternoon of the same day the case came on for hearing before Honorable H. A. P. Myers. The application was renewed upon the same grounds stated in the affidavits presented on the former application and an additional statement of counsel. Further continuance was denied. The cause was tried to a jury, the defendant introduced no evidence, and the court directed a verdict for plaintiff. The defendant moved for a new trial. The motion was overruled and judgment was entered upon the verdict. The defendant has appealed.

Appellant's first contention is that the trial court abused its discretion in declining to grant a continuance when the case was finally called for trial.

The first affidavit for continuance made by the appellant's attorney stated, in substance, that in May or June, 1911, he was employed by defendant as his attorney; that he entered into negotiations with the plaintiff looking to a settlement of the case; that the plaintiff offered to accept a specific sum in settlement provided the money was paid immediately, to which the defendant agreed, but there was unavoidable delay in making the payment; that the defendant was then at Iditarod, Alaska, and it was difficult to communicate with him; that the affiant shortly thereafter went east and returned some time in July, and in August he was advised that the authority to settle and arrange for payment of money in settlement had been delayed through no fault of the defendant; that it developed that settlement could not be made; that the affiant immediately attempted to communicate with the defendant, but was unable to reach him by letter or by wire; that the affiant was informed by the defendant's brother-in-law that the defendant would reach Seattle between the 5th and 15th of October, 1911; that so far as affiant was advised, the appellant did not know of the setting of the

case for trial, and that he was the most important witness for the defense.

In a second affidavit, the attorney stated that, during the latter part of August, 1911, he was for the first time advised that the case had been set for trial; that he immediately advised respondent's then attorneys, Wardall & Wardall, that it would be impossible for appellant to try the case at that time, and he would be compelled to move for a continuance; that he asked respondent's attorneys to ascertain whether their client would then accept in settlement the sum which he had agreed to accept in June, and if not, whether the case could be continued to the latter part of October; that affiant was advised a day or two later that the respondent would not accept the offered settlement and that respondent's attorneys stated that they would telegraph respondent and ascertain whether he would agree to the continuance; that affiant received no further information till a short time before the case was set for hearing. The affidavit then again set forth the importance of appellant's presence at the trial and stated that the affiant did not then know his address in Alaska or where he could be reached by letter or telegram but had been advised by the appellant when he left Seattle in May that he would return in October, 1911, and affiant had then told him he thought the case would not be reached for trial till the latter part of October.

The respondent in his affidavit contesting the continuance, among other things, stated:

"I had some negotiation with Mr. E. S. McCord, one of the attorneys for the defendant, looking to a settlement of said cause. The said E. S. McCord was advised by me that I would accept a certain sum in settlement of said cause, provided said sum was paid not later than June 3rd; said sum was not paid at that time, and I then abandoned my negotiations and the said E. S. McCord well knew upon that date that all negotiations looking to a settlement were terminated; the next day, and on June 4th, 1911, I accepted the position of Assistant United States Attorney for the First Division

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of Alaska, and shortly afterward proceeded to Ketchikan, Alaska, where I am now stationed in the discharge of my duties as such officer. Shortly after accepting said position I arranged for a leave of absence to enable me to come to Seattle to attend to the trial of said cause and to prepare for the same, upon the date said cause was set as aforesaid, and I secured from the Department at Washington, D. C., and my superior officer a leave of absence which entitles me to remain at Seattle for the trial of said cause for about ten days beginning September 21st and no longer, as I am at present advised. I further state that since the said 3rd day of June, 1911, there have been no negotiations for settlement and no negotiations at all between the said defendant, or any one on his behalf and myself, or any one upon my behalf, and during all of said time, the said defendant, or his representatives, have been advised that all negotiations were abandoned and that said cause was to be tried upon the day it has been set, or as soon thereafter as it could be reached; I further state, as a matter within my own knowledge, that there is and has been during all the time since June 3, 1911, telegraphic and mail communication between the city of Seattle and Iditarod, Alaska; that during all of said time, the said defendant F. G. Manley, has been at or within ten miles of Iditarod, Alaska, at which point he might have been communicated with at any time."

One of the respondent's attorneys also made an affidavit as follows:

"That he is one of the attorneys for the plaintiff in the above entitled action; that on the 8th day of August, 1911, Mr. McCord, of counsel for the defendant, called affiant up by telephone and offered Eight Thousand Dollars (\$8,000) cash to settle the case and also stated that Manley at that time would not attend trial; that on the said 8th day of August, 1911, affiant communicated with plaintiff for the purpose of ascertaining whether the plaintiff would accept said offer; that plaintiff and affiant exchanged telegraphic messages with each other as to offer of settlement; that plaintiff notified affiant that he would not accept the said offer and that plaintiff expected the cause to be tried upon the day named as the day of trial and upon receiving said information from plaintiff affiant on the 9th day of August, 1911, quoted plaintiff's telegraphic reply refusing the said offer to

Mr. McCord and then and there notified him to telegraph if necessary to Manley in order to get him out here in time for trial on, to wit: September 26th, informing him that the cause had already been delayed too long and that Mr. Nye would be here on the date set for trial; that Mr. McCord thereupon replied that he would make every effort to get Mr. Manley here for trial but feared that said Manley would be unable to reach here before the first of October."

It is the settled law of this state that the granting of a continuance is a matter resting within the sound discretion of the trial court, and that its refusal to grant a continuance will not be reviewed except for abuse of that discretion. *Juch v. Hanna*, 11 Wash. 676, 40 Pac. 341; *Warehime v. Schweitzer*, 51 Wash. 299, 98 Pac. 747.

"A stronger case for a continuance on account of the absence of a witness must be made, if that witness is a party to the action than would be required were he a third person, unless the case presents some peculiar feature from which some material injustice to the party's rights would result in case of trial without postponement. It is the duty of a party to be present at the trial of his own cause, and his absence will as a general rule be considered as his own peril. Especially is it proper to refuse a request for a continuance where it is not known where the party is or the cause of his absence, where the evidence proposed to be given could not affect the result of the trial, or where he has been guilty of gross negligence." 9 Cyc. 113-114.

Under all of the facts and circumstances appearing in the affidavits presented in behalf of both parties, we cannot say that there was an abuse of discretion in the refusal of a continuance when the case finally came on for trial. While the affidavits of the appellant's attorney may be held sufficient to exonerate the attorney from blame, they are not sufficient to excuse the appellant himself. The case was an important one involving a large sum of money. In his own interest he should have kept his attorney continually and particularly advised of his whereabouts, so that he could be reached by letter or by telegram within a reasonable time. The circumstantial affida-

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vit of the respondent stated that, during all the time from June 3d, 1911, till the trial, there was telegraphic and mail communication between Seattle and Iditarod, Alaska; that during all of that time the appellant was at or within ten miles of the latter place. This is not controverted. From the affidavit of the respondent's attorney, it appeared that on August 9, 1911, counsel for the appellant was advised that the plaintiff had refused the offer of settlement for \$8,000. The cause was not finally tried until October 9th. Had the appellant observed reasonable diligence in his own interest and kept in touch with his attorney, he could have been advised of the date of trial in time to attend. It is true that in many respects the affidavits presented in behalf of the parties respectively were contradictory, but those of the respondent and his attorney were the more circumstantial and exact. Moreover, the appellant must have known that the case had not been settled by reason of the fact that he was not advised of the payment of the money. From a careful consideration of the whole record, we cannot say that the trial court was not justified in refusing the continuance.

It is next urged that a new trial should have been granted. It is manifest that, if there was no abuse of discretion in refusing the continuance, there was none in refusing a new trial. The affidavits in support of the motion for new trial, in addition to the things set out in the affidavits for the continuance, merely detailed the evidence which the appellant and his witnesses claim would have been adduced had the continuance been granted. It is argued that they show a meritorious defense. Under the circumstances, this is not sufficient ground for a new trial. It is not the law that by showing a meritorious defense or cause of action which, by the exercise of reasonable diligence, might have been presented at the trial, the failure to exercise that diligence and present the evidence at the trial may be overcome. Such a situation certainly presents no stronger reason for a new trial than the claim of newly discovered evidence which the trial court has

found could have been discovered and produced at the trial by the exercise of reasonable diligence.

The judgment is affirmed.

FULLERTON, MORRIS, and MOUNT, JJ., concur.

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[No. 10413. Department Two. August 21, 1912.]

MATT WODNIK, *Respondent*, v. LUNA PARK AMUSEMENT  
COMPANY *et al.*, *Appellants*.<sup>1</sup>

NEGLIGENCE—DANGEROUS PREMISES—AMUSEMENT PARK—LIABILITY OF OWNERS—NEGLIGENCE OF LESSEES. The owner of an amusement park impliedly represents that advertised instrumentalities for amusement are reasonably safe, and cannot avoid liability for injury received through the unsafe condition of a mallet, used in connection with a striking machine, by the fact that the machine was operated by a lessee of space under an independent contract; since the lessee would be the agent of the owner.

SAME—UNSAFE APPLIANCES—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. Negligence is established, on the doctrine of *res ipsa loquitur*, where the head of a mallet, used in connection with a striking machine in an amusement park, flew off when an attempt was made to use it for the purpose for which it was furnished, the burden of explanation being cast on the defendant.

SAME—ASSUMPTION OF RISKS—INSPECTION. A patron in an amusement park does not assume the risk from an unsafe mallet which he is invited to use in connection with a striking machine, where there was no defect so patent that he ought to have observed it without inspection, the duty of inspection resting upon the owners of the park.

SAME—CONTRIBUTORY NEGLIGENCE. In such a case he is not guilty of contributory negligence in taking hold of the mallet handle near the upper end, where he had no reason to assume that the head would fly off, and there was no evidence that he was not using it as it was intended to be used.

Appeal from a judgment of the superior court for King county, Myers, J., entered March 16, 1912, upon the verdict

<sup>1</sup>Reported in 125 Pac. 941.

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of a jury rendered in favor of the plaintiff, in an action for injuries received by a visitor at an amusement park. Affirmed.

*Thomas B. McMahon* and *Geo. McKay*, for appellants.

*J. P. Ball*, for respondent.

ELLIS, J.—This is an appeal by the defendants, Luna Park Amusement Company and William Loeff, from a judgment rendered upon the verdict of a jury for damages for personal injuries to the plaintiff which it is charged were caused by their negligence.

The complaint, so far as material to the questions presented, in substance alleged, that the defendants were the owners and managers of a place of public amusement at West Seattle, called Luna Park, and had by extensive and broadcast advertising made the resort well known to the public, and that it was largely patronized by the public; that among the amusements there maintained was a mechanical device, called a striking machine, so arranged that a person by striking with a long handled heavy mallet upon a movable scale or balance was enabled to register thereon the force of the blow; that on April 30, 1911, the plaintiff visited Luna Park and accepted an invitation of the defendants through their agent or employee in charge of the striking machine to use the same, paid the money demanded therefor, and was given and used a mallet which was unsafe, in that the head was not securely fastened to the handle; that in using the mallet, he swung it above his head with both hands, intending to strike the machine, when the head of the mallet flew off, and the handle being released, he struck himself therewith a violent blow upon the knee, inflicting the injuries complained of. The negligence charged is that the defendants, their agents or employees, furnished to the plaintiff a mallet which they knew, or in the exercise of proper care, inspection and supervision could have known, was unsafe for the purpose intended.

The answer admitted the ownership, management, and extensive advertisement of the park as a place of amusement by

the defendants, denied the allegations of negligence, denied that the defendants owned or operated the striking machine, and set up as an affirmative defense in general terms that the injury was the result of the plaintiff's own negligence. This was traversed by the reply.

The evidence showed that one Friedle was the sole owner of the striking machine, and personally operated it on April 30, 1911, under a lease or concession of space from the defendants for the amusement season, paying the defendants 35 per cent of the gross receipts for the concession; that he hired and discharged his own employees; and that the defendants never exercised or attempted to exercise any authority over him. The appellants contend that, under this evidence, they cannot be held responsible for the injury. This position is not tenable. They were admittedly the owners, managers, and operators of Luna Park, and advertised its amusement features as a means of procuring the patronage of the public for their own pecuniary advantage. They received a part of the proceeds from the specific amusement feature in patronizing which the respondent was injured. He was there by their invitation. There was an implied representation that the instrumentalities for amusement which they advertised were reasonably safe. The fact that the amusement was furnished by a third party under an independent contract with the appellants in no manner relieved them from the duty to see that the appliances were reasonably safe for the use intended. The duty of exercising reasonable care for the safety of their patrons while engaged in the performance of the very purpose for which they were invited cannot be avoided in any such way. *Thompson v. Lowell, L. & H. St. R. Co.*, 170 Mass. 577, 49 N. E. 913, 64 Am. St. 323, 40 L. R. A. 345; *Richmond & M. R. Co. v. Moore*, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258. We think that, as between the respondent and the appellants the owner and operator of the striking machine must logically be held the appellants' agent.



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The appellants also contend that there was no evidence of negligence on their part. The respondent's testimony as to how the injury occurred was substantially as alleged in the complaint. We think that the fact that the head of the mallet flew off while the mallet was being used by the respondent for the very purpose for which it was furnished to him was sufficient to cast the burden of explanation upon the appellants. No explanation being offered, the jury was warranted in inferring that the head of the mallet came off because it was negligently and insecurely fastened to the handle.

"When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." 1 Shearman & Redfield, Negligence (5th ed.), § 59.

"The doctrine of *res ipsa loquitur* means that the jury, from their experience and observation as men, are warranted in finding that an accident of this kind does not ordinarily happen except in consequence of negligence. As was said in *Griffin v. Boston & Albany R. Co.*, 148 Mass. 143, 19 N. E. 166, 12 Am. St. 526, 1 L. R. A. 698: 'All that the plaintiff upon this branch of his case was required to do was to make it appear to be more probable that the injury came in whole or in part from the defendant's negligence than from any other cause.'" *Graaf v. Vulcan Iron Works*, 59 Wash. 325, 109 Pac. 1016.

There was no duty of inspection resting upon the respondent. There was no evidence of any defect so patent that he ought to have observed it without inspection. He had the right to assume that the mallet was fit for the purpose for which it was furnished him. He cannot be held to have assumed the risk of injury from any defects not so patent as to have been apparent to the casual observer. This court is committed to the rule that the doctrine *res ipsa loquitur*, under conditions where there is no duty of inspection upon

the servant, is applicable even as between master and servant. *LaBee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405; *LaBee v. Sultan Logging Co.*, 51 Wash. 81, 97 Pac. 1104; *Graaf v. Vulcan Iron Works*, *supra*; *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888.

*A fortiori* is the doctrine applicable in a case of this kind where a customer or patron is present by invitation, and is injured by an instrumentality under the exclusive control of the defendant or his agents. *Anderson v. McCarthy Dry Goods Co.*, 49 Wash. 398, 95 Pac. 325, 126 Am. St. 870, 16 L. R. A. (N. S.) 931. And for a still stronger reason should the doctrine be invoked where, as here, the instrumentality which caused the injury was handed to the patron for use in the very purpose for which he was invited. In the very nature of the case, the respondent could not be expected to prove the specific defect in the mallet which caused the head to separate from the handle. That could only have been determined by inspection. The duty of inspection was upon the appellants. They offered no evidence of such inspection. The jury was warranted in finding them negligent.

The appellants further contend that the respondent's own act in taking hold of the mallet handle near the upper end, as he testified he did, was the proximate cause of the injury, and that in so doing he was guilty of contributory negligence. The proximate cause was that cause without which the accident could not have happened. It is plain that had the head of the mallet been securely fastened to the handle, the accident would not have happened, no matter where the respondent grasped the handle. It is equally plain that he was not guilty of contributory negligence. He had no reason to assume that the head of the mallet would fly off. In fact, as we have seen, he had the right to assume that it would not. There was no evidence that he was not using the mallet as it was intended to be used. We fail to find any evidence whatever of contributory negligence. Nor do we find any

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merit in the argument that the accident was one which could not reasonably have been anticipated. It was the natural and probable result of the insecure fastening of the head of the mallet to the handle. This or some similar accident would reasonably be expected from such a condition.

Many assignments of error are based upon the giving of certain instructions by the court and upon the refusal to give certain others requested by appellants. These, however, are sufficiently covered by what we have said of the law as applied to the facts. The case was submitted to the jury upon instructions fairly presenting the law applicable to the evidence. We find in the record no error which would justify a reversal.

The judgment is affirmed.

MOUNT and FULLERTON, JJ., concur.

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[No. 10001. Department One. August 21, 1912.]

J. H. MOHNEY, *Appellant*, v. THOMAS H. ELLIS *et al.*,  
*Respondents*.<sup>1</sup>

MORTGAGES—REDEMPTION—AGREEMENT—ESTOPPEL. A redemption from a mortgage foreclosure will be decreed in favor of heirs owning a half interest in the land, where the purchaser at the foreclosure sale had agreed to assign the sheriff's certificate of sale upon payment of the judgment and to make a quitclaim to one of the heirs, to enable him to negotiate a loan on the property on behalf of minor heirs in order to effect the redemption; and after permitting the time for a regular redemption to expire, the purchaser is estopped to repudiate the agreement upon tender of the sum due, although proceedings to redeem were not taken in the manner required by statute.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered May 20, 1911, upon findings in favor of the defendants, in an action of ejectment, grant-

<sup>1</sup>Reported in 125 Pac. 1031.

ing redemption from a mortgage foreclosure as prayed by interveners, after a trial to the court. Affirmed.

*J. N. Pickrell*, for appellant.

*U. L. Ettinger* and *D. C. Dow* (*Chas. F. Voorhees*, of counsel), for respondents.

CROW, J.—On January 5, 1903, Thomas H. Ellis and Sarah C. Ellis, his wife, the owners of three hundred and twenty acres of land in Whitman county, their community property, mortgaged the same to Ladd & Bush, to secure their note for \$4,500. Sarah C. Ellis died intestate on or about September 17, 1906, leaving surviving her Thomas H. Ellis, her husband, and certain children of herself and husband, hereinafter mentioned. On March 4, 1908, Ladd & Bush commenced an action in the superior court of Whitman county to foreclose the mortgage. A decree was entered, and on June 13, 1908, the land was sold by the sheriff of Whitman county to J. M. Mohney, the plaintiff herein. Subsequent to the foreclosure, Thomas H. Ellis leased the land to R. W. Hall, who raised a crop of wheat thereon. On June 19, 1909, a sheriff's deed was executed and delivered to Mohney, and on August 11, 1909, he commenced this action against Thomas H. Ellis and R. W. Hall, to recover possession and for other relief.

On October 22, 1909, Lon L. Ellis, of the age of majority, son of Thomas H. Ellis and Sarah C. Ellis, deceased, and brother of Elmer T. Ellis, Elga J. Ellis, Dora A. Ellis, and Claude H. Ellis, all of whom were minor children and heirs at law of the deceased, petitioned the court to appoint a guardian *ad litem* for the minor heirs, alleging that he and they claimed an interest in the real estate. The petition was granted, the guardian *ad litem* was appointed, and with leave of court Lon L. Ellis and the minor heirs by their guardian *ad litem* filed their complaint in intervention. The defendant Thomas H. Ellis in his answer, and interveners in their complaint in intervention, pleaded their interest in the real

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estate, alleged that they were entitled to redeem, and had in equity redeemed from the sheriff's sale, demanded that the sheriff's deed be canceled, and that their title be quieted. There is no contest between Thomas H. Ellis and the interveners as to their respective interests. The facts upon which they predicated their claim need not be now mentioned. They were substantially found by the trial judge as hereinafter stated. From a decree canceling the sheriff's deed and quieting title in the defendant Thomas H. Ellis and the interveners, the plaintiff has appealed.

Most of the assignments of error involve the contention that the facts found by the trial court are not supported by the evidence. We have carefully examined the evidence and conclude the findings must be sustained. While in many instances these findings rest upon the oral evidence of J. H. Ellis, as against appellant's testimony, yet we conclude the preponderance is in favor of the findings made, as the statements of J. H. Ellis harmonize more perfectly with undisputed facts and circumstances, and are corroborated by other witnesses. The trial judge saw the witnesses, observed their demeanor, passed upon their credibility, and found in favor of the respondents. From his findings, which must be sustained, the following facts appear, in addition to the foreclosure proceedings above stated: That about six weeks before the year of redemption had expired, to wit, on or about May 1, 1909, J. H. Ellis, acting for Thomas H. Ellis and the interveners, asked appellant if he would accept a mortgage on the land for the sum necessary to redeem; that appellant replied he would require the money; that J. H. Ellis then informed appellant he could obtain the money to redeem, but that he would have to raise it by mortgage upon the land; that as there were minor heirs who could not execute a mortgage, it would be necessary for him to acquire the title, execute the mortgage, and then convey to Thomas H. Ellis and the heirs; that for such purpose it would be necessary that appellant assign the certificate of sale and make a quitclaim

deed to J. H. Ellis; that appellant then told J. H. Ellis that would be satisfactory; that he would assign the certificate of sale and execute the quitclaim deed upon payment to him of the money due on the redemption; that, relying upon appellant's promise and agreement, J. H. Ellis, acting for the respondents, negotiated from Balfour-Guthrie & Company a loan for a sum sufficient to pay appellant; that he temporarily borrowed \$7,948.80 from a Colfax bank, the amount due appellant on his certificate of sale to June 12, 1909, inclusive, and on that day tendered the same to appellant in the form of a certificate of deposit issued by the bank, payable to appellant, and requested appellant to assign the certificate of sale, and execute the quitclaim deed; that appellant did not except to the amount or form of the tender, but did refuse to assign the certificate of sale or to execute the deed, and at the time stated that he believed J. H. Ellis was attempting to defraud the minor heirs and deprive them of their interest in the land; that at all times while J. H. Ellis was attempting to redeem the land, appellant well knew he was acting for Thomas H. Ellis and the interveners; that the respondents, relying on appellant's promise made to J. H. Ellis, did not give the statutory notice to redeem; that when appellant declined the tender and refused to assign the certificate or execute the quitclaim deed, it was too late to give such notice; that, on account of appellant's failure to perform his agreement, J. H. Ellis could not mortgage the land to Balfour-Guthrie & Company; that relying on appellant's agreement, neither J. H. Ellis nor the respondents made any effort, other than those above stated, to raise the money with which to redeem; that on October 18, 1909, after the commencement of this action, respondent's attorney tendered appellant \$8,175.05 in gold coin, for the purpose of preserving the tender theretofore made, and for the further purpose of redeeming the land; that \$8,175.05 thus tendered covered the entire amount then due appellant, including taxes and interest; that the tender last mentioned was refused, but that respondents forthwith

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deposited the same with the clerk of the superior court for payment to appellant, and that on June 12, 1909, when the first tender was made, the fair market value of the land was \$20,000.

Upon these facts, we fail to understand how any court of equity could enter a decree other than the one of which appellant now complains. The appellant relies on the fact that no redemption was made in the manner or within the time provided by statute, that the sheriff's deed was issued, and that the respondents have lost all their rights. He testified that on June 12, 1909, when the first tender was made, he believed that J. H. Ellis, who made the tender, was defrauding the minor heirs; that, if they were not to have the land, he thought he might as well have it himself; that he then told J. H. Ellis to pay the money to the sheriff to whom he would then surrender his certificate of sale. There was not a shadow of proof nor a syllable of evidence, outside of appellant's suspicions stated by himself, which tended to show or even suggest that J. H. Ellis intended to defraud the minor heirs. Appellant claims he wanted to protect the minor heirs, yet he made no effort to do so by any practical method or procedure, nor did he attempt to find a trustee whom he could trust. On the contrary, he asserted and still asserts his right to hold land worth \$20,000 which but for his acts, the respondents might otherwise have arranged to redeem for about \$8,000. When on June 12, 1909, appellant directed J. H. Ellis to pay his borrowed money to the sheriff, he well knew that J. H. Ellis had perfected his plans in the belief that he was to obtain the title, upon which he could by mortgage obtain funds to repay the money he had temporarily borrowed from the bank before he conveyed the title to the respondents. He also knew that, if the money J. H. Ellis had borrowed from the bank should be paid to the sheriff, and appellant should surrender to the sheriff the certificate of sale, and should at the same time waive the statutory notice to redeem, which he did not agree to do, the title would pass

to respondents a number of whom were minors and could not secure J. H. Ellis by a mortgage lien for the money which he would thus advance. At that late day appellant was in no position to insist that J. H. Ellis should proceed in any such manner, knowing as he did that J. H. Ellis and the respondents had all acted in good faith upon his promise and agreement to assign the certificate of sale and execute the quit-claim deed.

Citing §§ 594, 595, and 599, Rem. & Bal. Code, appellant argues that the only right a judgment debtor has remaining after an execution sale is the statutory right of redemption, which must be asserted in the exact manner and within the limit of time prescribed by the statute. He further insists that the statutory method to be available must be strictly pursued. Even though no criticism be made on this contention, it will not avail appellant. Respondents' failure to redeem within the statutory period, or by exact compliance with the statutory method, resulted from appellant's acts which misled them into the belief that he would cause the title to vest in J. H. Ellis so that he might mortgage the land, raise the redemption money advanced by him, and then in turn permit respondents to redeem by accepting the title subject to the mortgage lien, for the satisfaction of which the land then worth \$20,000 would have been primarily liable and ample security. In other words appellant, with the assistance of J. H. Ellis who was acting for respondents, agreed upon a procedure for redemption other than that provided by the statute, and then refused to perform his agreement when it was too late for respondents to perfect other arrangements or give the statutory notice. Agreements to extend the time for redemption have been repeatedly enforced by courts of equity, and we see no reason why appellant's agreement to change the form of procedure for redemption should not be likewise enforced.

"So, if any agreement is entered into subsequently to the sale, though by parol, the substance of which is that the pur-



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chaser, or other holder of the certificate of sale, will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute; and not to enforce it in his favor, when it had been the means of lulling him into inaction, would be to pervert it into a cruel and fatal decoy. This the courts will not permit, nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds." 3 Freeman, Executions (3d ed.), p. 1859, § 316.

In *Newman v. Locke*, 66 Mich. 27, 36 N. W. 166, the court, in holding that the time for redemption should be extended, said:

"The equity of redemption was of considerable value, and a relinquishment of it would have been too great a sacrifice to make, unless it was absolutely hopeless to save it. Considering all the testimony, it has convinced me that complainant, from the acts and conversation of defendants, was led to giving up efforts to get money in other quarters, and to rest on the assurance that his interests were secure from further peril."

In the recent case of *Murphy v. Teutsch* (N. D.), 132 N. W. 435, the supreme court of North Dakota, citing authorities, stated the equitable rule, saying:

"The power of courts of equity to give relief in certain class of cases and permit a redemption of real estate sold under execution after the statutory period of redemption has expired has been generally recognized, and such power has been exercised when a proper state of facts required it. See *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *Wilson v. Eggleston*, 27 Mich. 257; *Graffman v. Burgess*, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839; *Schroeder v. Young*, 161 U. S. 334, 16 Sup. Ct. 512, 40 L. Ed. 721; *Hart v. Seymour*, 147 Ill. 598, 35 N. E. 246. Such power has been exercised by courts of equity most frequently upon a sufficient showing of either fraud, accident or justifiable mistake."

The controlling question before us is whether appellant did in fact agree to accept the money which would be due him on redemption, and in lieu of the regular statutory method of redemption, did further agree to assign the certificate of sale and make a quitclaim deed to J. H. Ellis. The evidence shows, and the trial court found, that he did. This being true, he cannot, in a court of equity, now assert his right to the land, nor can he now deny respondents' right to redeem, or that in equity they did redeem within the statutory period. The following cases, although not decided on facts entirely similar, announce equitable principles which should be controlling in this action: *Union Mut. Life Ins. Co. v. Kirchoff*, 133 Ill. 368, 27 N. E. 91; *Chytraus v. Smith*, 141 Ill. 231, 30 N. E. 450; *Butt v. Butt*, 91 Ind. 305.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and GOSE, JJ., concur.

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[No. 10384. Department Two. August 21, 1912.]

THE CITY OF SPOKANE, *Respondent*, v. M. H. THOMPSON  
*et al., Appellants.*<sup>1</sup>

ATTORNEY AND CLIENT—APPEARANCE—EMINENT DOMAIN—PROCEEDINGS. Where a railroad company had agreed to pay the damages awarded against a city in a street condemnation, it had a direct interest in the proceedings and it was not error to allow its attorney to represent the city.

EMINENT DOMAIN—PUBLIC USE—CHANGE OF STREET GRADE—ACCOMMODATION OF RAILROAD COMPANY. Under Rem. & Bal. Code, § 7507, providing that a city may authorize or prohibit the maintenance of a railroad in streets and prescribe the conditions thereof, the granting of a franchise to a public service railway corporation to cross a street at a specified height, and changes of street grades in the vicinity to meet the necessities of the railroad grade, are for a public use, notwithstanding that the railroad company agreed to pay all condemnation awards against the city.

<sup>1</sup>Reported in 126 Pac. 47.

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**SAME — PROCEEDINGS — PARTIES PLAINTIFF.** Condemnations for street grade changes to meet grades of a railroad company, which agreed to pay all condemnation awards against the city, are properly prosecuted in the name of the city.

**SAME—DAMAGES—RULE OF ASSESSMENT—OFFSET OF BENEFITS.** In condemnations for street grade changes to meet grades of a railroad company, the railroad agreeing to pay all condemnation awards against the city, being for the public benefit and not solely in the interest of the company, and being prosecuted in the name of the city, the damages are to be assessed under Rem. & Bal. Code, § 7782, and Const., art. 1, § 16, permitting cities to offset special benefits against the damage, and not under Id., § 926, authorizing damages against a railroad company irrespective of any benefit to the property.

**SAME—DAMAGES—OBSTRUCTION OF ALLEY.** The closing of a 16-foot alley by the change of grade of a street is a special damage to the property abutting on the alley.

**SAME—DAMAGES—EVIDENCE.** In condemnation proceedings to assess the damages from the elevation of F. street, evidence as to damages from the obstruction of an alley by a change of D. street is not admissible, not being an issue.

**SAME.** In condemnation proceedings to assess the damages to an abutting lot by reason of a change of street grade elevating the street through the entire block, it is error to confine the evidence of damage to that part of the street immediately in front of the lot.

Appeal by defendants from a judgment of the superior court for Spokane county, Kennan, J., entered March 6, 1912, upon the verdict of a jury assessing damages to abutting property from a change of grade. Reversed.

*Graves, Kizer & Graves*, for appellants.

*F. M. Dudley*, for respondent.

ELLIS, J.—Action by the city of Spokane to ascertain and assess the damage to abutting property by a change of grade of Front avenue. The city by ordinance changed the grade of Front avenue and of Division street, which intersect each other, the former running east and west, the latter north and south. It then by ordinance provided for the institution of condemnation suits against the owners of abutting properties. This action relates only to the change of grade of Front avenue, and includes as defendants all the

owners of properties abutting upon the part of that street so changed. The action was tried separately as to the defendants Thompson, owners of lot 4, in block 9, in Havermale's addition to Spokane, which lot abuts upon the south line of Front avenue, 150 feet west of Division street. From a judgment entered upon a verdict for \$2,700 in their favor, the defendants Thompson and wife appealed.

The appellants have made thirty-one assignments of error, but they may be grouped for discussion.

(1) Several of the assignments relate to the rulings of the trial court by which the appellants were prevented from showing to the jury the connection of the Chicago, Milwaukee & Puget Sound Railway Company with the case. That relation, as shown by the evidence and offered evidence, is as follows:

The city by ordinance, granted to the railway company the right to construct, maintain and operate a railway along, over, under, upon and across certain streets and alleys, among them the right to cross Division street. The ordinance prescribed the locations and elevations at which the tracks shall cross the various streets, the material provisions relating to the Division street crossing being as follows:

"That said main line tracks shall be constructed and maintained over and across those portions of Center and Division streets lying between the north line of Front avenue, in the city of Spokane, and a line parallel therewith and one hundred and fifty-eight (158) feet northerly therefrom. . . .

"Said main line tracks shall be carried across said Division street at an elevation of approximately nine and three-tenths (9.3) feet below the present established grade of said street; and the said grantee, its successors and assigns, may and shall provide for the carrying of said Division street over and above any and all tracks to be constructed by the said grantee, its successors and assigns, by a suitable viaduct in the manner hereinafter more particularly set forth and described. . . .

"The said freight and passenger tracks, yard tracks, switches and spurs hereinbefore referred to, shall be carried

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across said Division street between the north line of Front avenue and a line parallel therewith and one hundred and fifty-eight (158) feet northerly therefrom, underneath the viaduct to be constructed over said tracks as herein elsewhere provided. . . .

“The city of Spokane shall, as soon as practicable, proceed to change the established grade of that portion of Division street lying between the Great Northern railway tracks and Main avenue; also that portion of Front avenue lying between Browne and Market streets, and shall cause to be prepared plans and specifications for the regrade of those portions of said street and avenue hereinbefore described, and for a viaduct to be constructed for the purpose of carrying public traffic over, across and above the tracks herein authorized to be constructed across Division street, at an elevation of approximately twenty (20) feet above the level of said main tracks, so that the established grades of said Front avenue and Division street shall not exceed four (4) per cent; . . . And said city of Spokane shall thereupon institute and diligently prosecute such proceedings as shall be necessary for the assessment of the damages, if any, to abutting property by reason of the changes of grade and the construction of the viaduct hereinbefore provided for which said damages when ascertained, shall be paid by the grantee, together with the costs and expenses of such proceedings, excepting attorney fees; and the grantee for itself, its successors and assigns, agrees to indemnify and hold harmless the city of Spokane against any claims for damages by reason of such changes of grade and the construction or maintenance of said viaducts; . . .

“The said viaducts shall be constructed by and under the authority and direction of the city of Spokane and upon such plans and specifications as said city shall authorize, but at the expense of the grantee, and shall at all times be under the control and supervision of said city; . . .

“Said grantee also agrees, at its own expense, to make and complete the changes of grade herein provided for in respect to the portions of Division and Market streets and Front avenue hereinbefore described, including the restoration of the surface of said streets by repaving or otherwise, all to the approval of the board of public works.”

The streets material to this inquiry crossing or running into Front avenue enumerating from west to east are Washington, Center, Brown, Division, Market, and Colfax. Between Washington street on the west, and the point east of Colfax street on the east, the tracks of the railway company occupy a zone from 150 to 158 feet in width parallel with and abutting upon the north line of Front avenue. The avenue is not crossed nor occupied by the tracks of the railway company in the neighborhood of Division street. These tracks do, however, cross Center, Division, Market and the other north and south streets which intersect Front avenue a short distance south of such railway crossings. The grade of the tracks at the Division street crossing being fixed by the city at 9.3 feet below the existing street grade, it was necessary to either lower the grade of Division street so as to make a grade crossing or elevate the street so as to permit travel to pass above the tracks on a viaduct. The city adopted the latter plan, and provided that the viaduct should be approximately 20 feet above the tracks in order to give clearance for trains, thus elevating the street grade at the point of crossing approximately 11 feet. This point was less than 158 feet north of the intersection of Division street with Front avenue. In order to make a practicable approach, the foot of the incline was started at Main avenue, a street parallel with and one block south of Front avenue, thus raising the grade of Division street about eleven feet at its intersection with Front avenue. This necessitated either a corresponding raise of the grade of Front avenue in order to preserve the connection between the two streets, or a breaking of that connection by carrying Division street over the avenue by a viaduct. The city adopted the first plan. In order to make a 4 per cent grade, the change began at the east line of Brown street, the first north and south street crossing the avenue to the west of Division street, the rise being uniform from there to a height of about eleven feet at the intersection of the avenue with Division street. This makes the grade in front of appellants'

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lot about 6½ feet at the west line and 7½ feet at the east line above the former grade. The railway company, by accepting the franchise, was obligated to pay all damages awarded against the city by reason of the change of grade. The attorneys for the railway company, over the objection of the appellants, were permitted to represent the city in this suit.

This last objection may be disposed of at once. The railway company having agreed to pay the damages, had a peculiar interest in the suit. The appearance of its attorneys was in no manner prejudicial to the appellants.

In order to conserve space, we will not detail the offered evidence. It will suffice to say that it included the franchise ordinance as a whole; and when that was rejected, § 9 of that ordinance, which contains the undertaking on the part of the railway company to pay all damages resulting from the changes of street grades made necessary by constructing the railroad tracks as provided in the ordinance. There were also various offers of evidence to show the purpose of the change of grade of Front avenue and the relation of that change to the change of grade of Division street.

The appellants first contend that this offered evidence was competent as showing that the purpose of the change of grade was a private and not a public or municipal purpose, and that the city therefore could not maintain this action.

The respondent contends that the question of public use was not in issue at the time the offer of this evidence was made, and that by the failure to raise the question before the jury was empanelled, the appellants had waived the question of public use; and, moreover, that the offer was not made for the purpose now claimed but only for the purpose of augmenting the damages. We find it unnecessary to decide whether, under the circumstances, this question was sufficiently raised or was raised in time, since in any event the evidence offered would not have shown that the change of

grade was not for a public use. Every city of the first class is by statute expressly empowered:

"To authorize or prohibit the locating and constructing of any railroad or street railroad in any street, alley, or public place in such city and to prescribe the terms and conditions upon which any such railroad or street railroad shall be located or constructed," etc. Rem. & Bal. Code, § 7507, subd. 9.

Since the use of streets can be permanently granted only for public purposes, the right to lay tracks in the streets can only be granted to public service railway companies and only for use in their public service. This statutory power is therefore dependent for its validity upon the fact that such railroads are public utilities. Its validity rests upon the same public considerations as does the grant of power of eminent domain to railroad corporations. The power in both instances is referable to the public interest, and not to the private benefit of the railway company. *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448; *Glaessner v. Anheuser-Busch Brewing Ass'n*, 100 Mo. 508, 13 S. W. 707; *Mikesell v. Durkee*, 34 Kan. 509, 9 Pac. 278; *Butler v. Penn Tobacco Co.*, 152 N. C. 416, 68 S. E. 12, 136 Am. St. 831; *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172; *Swift v. Delaware, L & W. R. Co.*, 66 N. J. Eq. 34, 57 Atl. 456; *Mayor etc. of Macon v. Harris*, 73 Ga. 428; *Grand Trunk & Western R. Co. v. South Bend*, 174 Ind. 203, 89 N. E. 885, 91 N. E. 809, 36 L. R. A. (N. S.) 850; *Knapp, Stout & Co. v. St. Louis Transfer R. Co.*, 126 Mo. 26, 28 S. W. 627.

That the railway company here involved is a public service corporation is not questioned, nor is it contended that the track crossing Division street is not intended for use in connection with the public functions and uses of that company. The granting of the franchise to cross the street was, therefore, an appropriation of the street to a legitimate public use. *Dulaney v. United R. & Elec. Co.*, 104 Md. 423, 65 Atl. 45. In exercising the power to make the grant the city exercised



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a legislative function as a governmental agency of the state. *People ex rel. Rockwell v. Chicago Tel. Co.*, 245 Ill. 121, 91 N. E. 1065; *Murphy v. Chicago, R. I. & P. R. Co.*, 247 Ill. 614, 93 N. E. 381; *State ex rel. Rose v. Superior Court*, 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. (N. S.) 819; *Grand Trunk & W. R. Co. v. South Bend*, *supra*. It must be presumed that this power, which is granted to cities for the public good, has been exercised in the public interest, and that the level of the tracks across Division street prescribed by the city is that best adapted to the public interest. This was a matter within the discretion of the city, and its decision will not be reviewed in the absence of plain abuse. The offered evidence was insufficient to show such an abuse. It is also well established that a city in the exercise of its police power over the streets has authority to change the grade of a street to avoid a dangerous railroad crossing and that such a change is for the benefit of the public and is a public use. *Summerfield v. Chicago*, 197 Ill. 270, 64 N. E. 490; *Weage v. Chicago & W. I. R. Co.*, 227 Ill. 421, 81 N. E. 424, 11 L. R. A. (N. S.) 589; *Henderson v. Lexington*, 33 Ky. Law 703, 111 S. W. 318; 1 Lewis, Eminent Domain (3d. ed.), § 307.

If in time past the railway company had been granted a franchise to cross Division street with its tracks at grade and the tracks had been so constructed and the city had, in the exercise of its police power, subsequently required the elevation of the street so as to carry travel over the tracks on a viaduct and avoid a dangerous crossing, as now contemplated, no one would contend that such a change was not for the public benefit or that the consequent damaging of abutting property was not for a public use. Manifestly it can make no difference, either as to the benefit to the public or as to the character of the use, that the elevation of the street is required in the first instance and the dangerous crossing avoided from the beginning. Nor does it alter the case that the city in the ordinance granting to the railway company

the license to cross the streets required that company to pay the expense of such changes and the damages resulting therefrom. The city had the power to make the changes at its own expense if in the exercise of its legislative governmental functions it deemed them for the public benefit. That it entered into a contract with the railway company whereby that company undertook to pay the expense in no manner affects the character of the use. *Summerfield v. Chicago, supra.*

"In regulating and controlling the use of the streets and alleys within its limits, and the maintenance and operation of railroads upon and over them, the city is in the exercise of a governmental function. An ordinance granting authority for such purpose and fixing the rights and liabilities of the railroad companies is a legislative act, even though it may by the act of the companies become also a contract." *Murphy v. Chicago, R. I. & P. R. Co.*, 247 Ill. 614, 93 N. E. 381.

See, also, *People ex rel. Rockwell v. Chicago Telephone Co.*, 245 Ill. 121, 91 N. E. 1065; *Appeal of New York & N. E. R. Co.*, 58 Conn. 532, 20 Atl. 670; *Chicago, B. & Q. R. Co. v. State ex rel. Omaha*, 47 Neb. 549, 66 N. W. 624, 53 Am. St. 557, 41 L. R. A. 481; *New York & N. E. R. Co. v. Bristol*, 151 U. S. 556; *Kaufman v. Tacoma, Olympia, & G. H. R. Co.*, 11 Wash. 632, 40 Pac. 137; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256.

The question must be resolved contrary to the appellants' contention upon the consideration that the grant of the right to cross the street with railroad tracks was an appropriation of the street to a legitimate public use. It follows as a corollary that all changes in adjacent streets made necessary thereby are likewise legitimate public uses for which the city may take or damage property upon paying compensation. The proceedings were properly brought in the name of the city. While it is true that in *Spokane Traction Co. v. Granath*, 42 Wash. 506, 85 Pac. 261, the suit was maintained in the name of the railway company, the right of that com-

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pany to bring the proceedings seems not to have been questioned. Since the city alone can change the grade of a street, it would seem that logically condemnation for such change should be instituted by the city.

(2) It is next contended that the offered evidence as to the purpose of the change of grade of Front avenue was in any event admissible upon the question of damages. It is argued, that this evidence would show that the change of grade was made solely in the interest of the railway company; that the change must therefore be treated as made by the railway company and that the damages should be assessed under Rem. & Bal. Code, § 926, irrespective of any benefit to the property from the change, thus avoiding the rule of damages prescribed by Rem. & Bal. Code, § 7782, and the state constitution, art. 1, § 16, permitting special benefits to be offset against the damages in condemnations by municipalities. An instruction of the court in accordance with the last mentioned statute is also assigned as error. What we have already said effectually disposes of this contention. If, as we have hereinbefore held, the evidence offered was not sufficient to show an abuse of the legislative discretion reposed in the city council in granting the franchise to lay the railroad tracks across Division street, then the change of grade of Front avenue, made necessary by the railroad crossing on Division street, was not made solely in the interest of the railway company but in the interest of the public. As we have seen, the damaging resulted from the lawful exercise of discretionary powers vested in the city for the public benefit. Whatever injury was done to appellants' property "was done by the city in the exercise of its municipal control over the streets." *Brown v. Scranton*, 231 Pa. St. 593, 80 Atl. 1113.

The proceedings being properly brought in the name of the city. It follows that, under the express terms of the statute and art. 1, § 16 of the state constitution, special benefits if there are any must be offset against damages. The question is no longer an open one.

In *Kaufman v. Tacoma, Olympia & G. H. R. Co.*, *supra*, at pages 636 and 637, this court said:

"The city changed the grade of the street and authorized its improvement by the construction of a tunnel and the building of a plank roadway thereover. This could have been done solely for a municipal purpose, and the special benefits arising therefrom could have been offset against, or, if blended therewith, taken into consideration in arriving at the damages sustained by abutting property owners.

"As to the rule of damages, the constitutional provision aforesaid makes no distinction as to the purposes for which land is taken or damaged, except as it may be limited by the powers of the party taking, but it does make a distinction as to persons. A municipal corporation can assess or offset benefits. No other can. The city having changed the grade and authorized the improvement of the street as aforesaid, if it was an improvement, it should make no difference as to the rule of damages whether the city contracted for the performance of the work directly, or simply empowered another party to perform it. This could not alter the case as to the respondents. . . .

"The improvement of this street was the city's property—the city's work—and in an action brought for damages, benefits could have been taken into consideration. The question is determined by determining who caused the injury, if any. Clearly the city changed the grade and authorized the improvement. No other power, unless possibly the legislature, could have done this. The railroad company had no such rights."

See, also, *Spokane Traction Co. v. Granath*, *supra*, which cannot be soundly distinguished from the *Kaufman* case, which it cites with approval on the point here under discussion. The offered evidence would not have justified the court in dismissing the proceedings. It would not have affected the rule of damages. The court committed no error in rejecting it.

(3) Certain assignments of error are predicated upon the refusal of the court to receive evidence of damage to appellants' property by reason of the obstruction of the easterly end of the alley in the rear of their lots by the elevation of

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the grade of Division street. The alley is parallel with Front avenue and does not open into that avenue at all. The court did admit evidence of the effect upon the appellants' property in its use of the alley produced by the raise of grade of Front avenue in front of the property on an average of about 7 feet, the alley remaining at the former level. It excluded evidence as to damages which would result from the obstruction of the east entrance to the alley by raising the grade of Division street. In this we find no error. These proceedings are brought for the single purpose of assessing the damages which would result from changes in grade of Front avenue. Damages resulting from the change of grade of Division street are not in issue in this proceeding. There can be little question under the authorities cited by the appellants that the closing of one end of a 16-foot alley is a special damage to all property abutting upon that alley for which the owners would have a right of action. *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843; *Dries v. St. Joseph*, 98 Mo. App. 611, 73 S. W. 723. Such damages, however, cannot be assessed in this action which relates solely to the damages resulting from the elevation of the grade of Front avenue.

There was some evidence that the elevation of Front avenue would make the alley more beneficial than it otherwise would be as an access to the basement of any building placed upon the lot. Evidence that the alley was no thoroughfare would be admissible to rebut such evidence of benefit but not as an element of damage. The cause of the obstruction of the alley would be immaterial in this action.

(4) The court confined the evidence as to the change of grade to that part of Front avenue immediately in front of appellants' lot and included within the side lines of the lot produced. By instruction it restricted the consideration of the jury to that specific part of the grade and the recoverable damages to those resulting alone therefrom. In a majority of cases, such a ruling would be fair to neither side. It is

obvious that the damage peculiar to the lot which would be caused by the change of grade immediately in front of it might be either augmented or diminished by the relation of that change to the changes in the grade of the same street extending in either direction from that point. While the question is, as contended by the respondent, one of access to the lot, the effect of the change of grade on that access is manifestly dependent upon the change as affecting the entire street upon which the lot abuts. It is the continuous street which gives access. Any attempt to segregate and consider alone that part immediately in front of the lot would be not only unjust but impracticable. Any change which materially impairs that access in a manner peculiar to the property abutting upon the street is a special damage to each property so abutting and an invasion of the special property right of access by means of the continuous street. The damage is special because different not only in degree but in kind from that of the general public. Access imports not merely the means of passing from lot to street, but a means of travel to and from the lot to and from other portions of the city.

"It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is, property, regardless of the extent of such value." *Long v. Wilson*, 117 Iowa 267, 93 N. W. 282, 97 Am. St. 315, 60 L. R. A. 720, 721.

See, also, *Borghart v. Cedar Rapids*, 126 Iowa 313, 101 N. W. 1120, 68 L. R. A. 306; *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218,

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63 N. E. 302, 92 Am. St. 305, 57 L. R. A. 508. None of the decisions of this court cited by the respondent as sustaining the trial court go to that extent.

In *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, the question here involved was not presented. The changes were in a cross-street upon which the plaintiff's property did not abut.

In *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316, the lot in question was upon a corner made by two streets. A portion of one of these lying beyond the lot was vacated. The other street upon which the lot also abutted was not interfered with, and through it and the unvacated portion of the first mentioned street and other nearby cross-streets easy access to the lot in all directions remained available. The opinion rests not upon an inadmissibility of evidence but on its insufficiency to show any special damages. Had the vacated street been the only means of access, or had the access been materially impaired, the decision must have been different though the lot did not directly abut upon that part of the street which was vacated. Moreover, the evidence showed that the market value of the property was not diminished by the vacation.

In *Mottman v. Olympia*, 45 Wash. 361, 88 Pac. 579, complaint was made of the vacation of a street beyond that part upon which the plaintiff's property abutted. A cross-street intervened between his property and the vacated part of the street. As in the *Ponischil* case the decision turned upon the insufficiency of the evidence to show any material or special interference with the access to the property; not alone upon the fact that the property did not abut directly upon the vacated part of the street.

In *In re Fifth Avenue and Fifth Avenue South*, 62 Wash. 218, 113 Pac. 762, the changes were in a cross-street upon no part of which the plaintiff's property abutted. The writer of this opinion is inclined to the personal view therein expressed by Judge Gose that "any arbitrary attempt to limit

the right to recover damages to the abutting owner is illogical," and it would certainly be much more illogical to further arbitrarily limit as a matter of law even the abutting owner's right to a recovery of such damages only as he can show will result from the change in that part of the street actually tangent to his property without reference to the fact that the change in the same street extends in either direction. This court has never gone so far and we are not, as in the *Fifth Avenue* case, bound by the doctrine of *stare decisis*.

In the case before us, the trial court in so limiting the evidence and the recoverable damages committed prejudicial error. It will be unnecessary to review the other assignments of error, since what we have said will sufficiently indicate the scope which the inquiry should take on a retrial.

The cause is reversed and remanded for a new trial.

MOUNT, MORRIS, FULLERTON, and CROW, JJ., concur.

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[No. 10348. Department One. August 22, 1912.]

UNION ELEVATOR & WAREHOUSE COMPANY, *Respondent*, v.  
FARMERS' WAREHOUSE COMPANY, *Appellant*.<sup>1</sup>

WAREHOUSEMEN—DELIVERY—BREACH OF CONTRACT—LIABILITY. A warehouseman who loads out wheat, stored under the usual form of warehouse receipt, which was "wet, mouldy and in a growing condition," is liable in damages, where there was no acceptance at the warehouse and no evidence that it was damaged in transit.

APPEAL—REVIEW—EVIDENCE. The credibility of the evidence sustaining a judgment will not be considered on appeal.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered December 1, 1911, upon findings in favor of the plaintiff, in an action of tort, after a trial to the court. Affirmed.

<sup>1</sup>Reported in 125 Pac. 960.



*C. H. Spalding and J. M. Simpson*, for appellant.

*Lovell & Davis*, for respondent.

CHADWICK, J.—This action was brought by respondent to recover damages, alleged to have been suffered by reason of the fact that appellant loaded out wheat, stored under the usual form of warehouse receipt, that was “wet, mouldy and in a growing condition” when it reached the Tacoma terminal.

Many errors are assigned but, as we view the case, it being largely a question of fact, we shall not discuss them further than to say that we find evidence to sustain the judgment. However, inasmuch as appellant earnestly contends that the effect of the judgment is to make it and other warehousemen liable to meet the tests and exactions of terminal weights and grades, we shall extend this opinion to the extent of saying that we do not so interpret the findings of the lower court. The duty of a warehouseman to turn out wheat is performed when he delivers the specific article on the cars, or, if the receipt be in such form, wheat of like kind and quality. If it had been proven that there was an acceptance at the warehouse, or that the wheat was damaged in transit, appellant might have recovered; but there is ample testimony to sustain the court's findings that the wheat was damaged when loaded. This being so, appellant is liable for its breach of contract.

Counsel have invited us to pass upon the weight of the evidence, saying that the only evidence worthy of belief is with appellant. The judgment being sustained by the evidence, we shall not pass upon its credibility.

Judgment affirmed.

CROW, GOSE, PARKER, and MORRIS, JJ., concur.

[No. 10261. Department Two. August 22, 1912.]

**SEATTLE MATTRESS & UPHOLSTERY COMPANY, *Appellant*, v.  
THE CITY OF SEATTLE, *Respondent*.**

**OLIVER T. ERICKSON *et al.*, *Appellants*, v. THE CITY OF  
SEATTLE, *Respondent*.<sup>1</sup>**

**MUNICIPAL CORPORATIONS—ASSESSMENTS—INTEREST ASSESSABLE.**  
An ordinance providing that the city treasurer shall collect from the owner of any subdivision of a lot such proportion of the assessment thereon as the city engineer shall certify to be chargeable to such subdivision, was not intended to authorize the segregation of a leasehold interest from the fee.

**SAME—ASSESSMENTS—OBJECTIONS—FAILURE TO INCLUDE PROPERTY.**  
An assessment is not invalidated by the failure to assess all the property within the assessment district, in the absence of an affirmative showing that the omitted property was specially benefited, the presumption being that it was not benefited.

**SAME.** The mere fact that real estate omitted from assessment was contiguous to the improvement is not sufficient to overcome the presumption that it was omitted because not benefited.

**SAME—ASSESSMENTS—REVIEW—PARTIES ENTITLED—MODIFICATION.**  
Where the court reduced an assessment against the leasehold and charged part against the fee, the lessee cannot complain that the court had no power to originate an assessment against the fee, the owner of the fee not complaining, and Rem. & Bal. Code, § 7551, providing that the court on appeal may correct or modify the assessment.

**SAME—ASSESSMENTS—APPORTIONMENT—EVIDENCE — SUFFICIENCY.**  
An assessment for a permanent street fill, charging two-thirds of the cost against leaseholds and one-third against the fee, is sustained, where the lease had twenty-one years to run, with the preference right of renewal, the leaseholds received the whole of the present benefit and are relatively more enhanced in value than the fee, and the evidence as to the benefits was conflicting.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 15, 1912, upon findings in favor of the city, modifying an assessment, upon appeal from the confirmation of the city council. **Affirmed.**

<sup>1</sup>Reported in 125 Pac. 1013.

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*Murphy & Wall*, for appellants.

*James E. Bradford* and *Howard A. Hanson*, for respondent.

ELLIS, J.—This is an appeal from a judgment of the superior court for King county, modifying an assessment, as confirmed by the city council of Seattle, upon certain leasehold interests in the west 120 feet of lots 2, 3, 4, and 5, of block 279, Seattle tide lands. The ordinance pursuant to which the assessment was levied provided for the improvement of Fourth avenue, south, between Seattle boulevard and Holgate street, together with certain other streets, by filling the same. The appellants objected to the assessments, and were accorded a hearing before the city council. Their objections were overruled and the assessments were confirmed by ordinance. The two appeals were taken from this action of the council to the superior court. The appeals were consolidated for trial. The appellants are owners of leasehold interests in the tide land, the fee being in the state. The assessment roll as originally made and confirmed by the council cast the entire burden of the assessment against these tide lands upon the leasehold interests. Among the objections urged before the city council, and made the basis of the appeal to the superior court, was the following:

“That the tax sought to be assessed against the leasehold interests of your objector in said property is as great as the tax levied upon lots and parcels of land upon the same street wherein the fee simple title to the same is in private individuals, and where there is no outstanding leasehold interest or other title.”

The appellants urged before the city council a segregation and apportionment of the assessments between the fee and the leasehold interests. The council refused to make the apportionment. On the appeal after a full hearing the superior court sustained this objection, and by decree modified the assessments by apportioning one-third to the fee and two-thirds to the leasehold interests, and directed the city council to cor-

rect and modify the assessment roll accordingly. From that decision, the appeal to this court was prosecuted.

The appellants contend (1) That the assessments are invalid; (2) That the court had no power to segregate or apportion the assessment between the fee and the leasehold interests; (3) That, if the court had such power, it has not justly exercised it in this case. We will consider these in their order.

(1) It is urged that the assessments were invalid because not made in accordance with a city Ordinance No. 4,165, which authorizes the city treasurer to collect from the owner of any subdivision of any lot or tract upon which an assessment has been or shall be made such portion of the assessment as the city engineer shall certify to be chargeable to such subdivision, in accordance with the provisions of the charter and ordinances in force when the original assessment was made. This ordinance was manifestly not intended as a part of the original proceeding in making the assessment roll, but to provide an easy and convenient mode of segregation for collection of the assessment where title to a part of a lot or parcel against which the assessment was originally levied as a whole has changed ownership. It was never intended to apply to a segregation of *interests*, as a leasehold from the fee but to a segregation of the *tract* or *parcel* by subdivision.

It is also urged that the assessment is void because not made in accordance with the ordinance providing for it, nor in accordance with the city charter. The ordinance provided that the assessment district should have bounds as prescribed by the city charter. The city charter provides that, unless otherwise provided by the ordinance creating it, the assessment district shall extend to the middle of the adjoining blocks. Block 279 of the Seattle tide lands is 660 feet square. The line of the district therefore extended 330 feet back from Fourth avenue, south, which runs along the west side of the block. The lots here in question are 330 feet deep and extend back to the east line of the district. Only the

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west 120 feet of these lots was assessed, though all of the west 270 feet was included in the appellants' leaseholds. The remainder of these lots, comprising the east sixty feet, is owned by and included in the right of way of the Oregon & Washington Railway Company and of the Great Northern Railway Company. This sixty-foot strip is within the half block from Fourth avenue, south. The appellants contend that the failure to place any of the assessment for the improvement upon this sixty-foot strip invalidated the whole assessment. There is no complaint because the assessment was not spread over the entire leaseholds, but only that the railroad land was not assessed. The objection before the council was "that some of the parcels of land specially benefited by said improvement and within said improved district have not been assessed."

The city council, in failing to assess this strip and in overruling this objection and confirming the assessment roll, must have done so upon the ground that in its judgment this strip received no benefit from the improvement. Manifestly, if it was not specially benefited, it could not be assessed, whether lying within or without the district. Neither before the council nor on the appeal to the superior court was any evidence offered by the appellants showing, or tending to show, that this strip was specially benefited, either actually as railroad property or potentially by increasing its value as real estate for any use. While there are many authorities to the contrary, we think that both the better reasons and the more persuasive authorities sustain the view that, in the absence of such evidence, the courts must indulge every presumption in favor of the regularity and propriety of the action of the assessing officer or body. This is a general rule applicable to all official action. To have any standing here, the appellants should have shown affirmatively that the omitted property was benefited. In the absence of such showing, we must presume that it received no benefit and was therefore properly omitted.

In *Kaufman v. Tacoma, Olympia & G. H. R. Co.*, *supra*, at pages 636 and 637, this court said:

"The city changed the grade of the street and authorized its improvement by the construction of a tunnel and the building of a plank roadway thereover. This could have been done solely for a municipal purpose, and the special benefits arising therefrom could have been offset against, or, if blended therewith, taken into consideration in arriving at the damages sustained by abutting property owners.

"As to the rule of damages, the constitutional provision aforesaid makes no distinction as to the purposes for which land is taken or damaged, except as it may be limited by the powers of the party taking, but it does make a distinction as to persons. A municipal corporation can assess or offset benefits. No other can. The city having changed the grade and authorized the improvement of the street as aforesaid, if it was an improvement, it should make no difference as to the rule of damages whether the city contracted for the performance of the work directly, or simply empowered another party to perform it. This could not alter the case as to the respondents. . . .

"The improvement of this street was the city's property—the city's work—and in an action brought for damages, benefits could have been taken into consideration. The question is determined by determining who caused the injury, if any. Clearly the city changed the grade and authorized the improvement. No other power, unless possibly the legislature, could have done this. The railroad company had no such rights."

See, also, *Spokane Traction Co. v. Granath*, *supra*, which cannot be soundly distinguished from the *Kaufman* case, which it cites with approval on the point here under discussion. The offered evidence would not have justified the court in dismissing the proceedings. It would not have affected the rule of damages. The court committed no error in rejecting it.

(3) Certain assignments of error are predicated upon the refusal of the court to receive evidence of damage to appellants' property by reason of the obstruction of the easterly end of the alley in the rear of their lots by the elevation of

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the grade of Division street. The alley is parallel with Front avenue and does not open into that avenue at all. The court did admit evidence of the effect upon the appellants' property in its use of the alley produced by the raise of grade of Front avenue in front of the property on an average of about 7 feet, the alley remaining at the former level. It excluded evidence as to damages which would result from the obstruction of the east entrance to the alley by raising the grade of Division street. In this we find no error. These proceedings are brought for the single purpose of assessing the damages which would result from changes in grade of Front avenue. Damages resulting from the change of grade of Division street are not in issue in this proceeding. There can be little question under the authorities cited by the appellants that the closing of one end of a 16-foot alley is a special damage to all property abutting upon that alley for which the owners would have a right of action. *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Sweeney v. Seattle*, 57 Wash. 678, 107 Pac. 843; *Dries v. St. Joseph*, 98 Mo. App. 611, 73 S. W. 723. Such damages, however, cannot be assessed in this action which relates solely to the damages resulting from the elevation of the grade of Front avenue.

There was some evidence that the elevation of Front avenue would make the alley more beneficial than it otherwise would be as an access to the basement of any building placed upon the lot. Evidence that the alley was no thoroughfare would be admissible to rebut such evidence of benefit but not as an element of damage. The cause of the obstruction of the alley would be immaterial in this action.

(4) The court confined the evidence as to the change of grade to that part of Front avenue immediately in front of appellants' lot and included within the side lines of the lot produced. By instruction it restricted the consideration of the jury to that specific part of the grade and the recoverable damages to those resulting alone therefrom. In a majority of cases, such a ruling would be fair to neither side. It is

obvious that the damage peculiar to the lot which would be caused by the change of grade immediately in front of it might be either augmented or diminished by the relation of that change to the changes in the grade of the same street extending in either direction from that point. While the question is, as contended by the respondent, one of access to the lot, the effect of the change of grade on that access is manifestly dependent upon the change as affecting the entire street upon which the lot abuts. It is the continuous street which gives access. Any attempt to segregate and consider alone that part immediately in front of the lot would be not only unjust but impracticable. Any change which materially impairs that access in a manner peculiar to the property abutting upon the street is a special damage to each property so abutting and an invasion of the special property right of access by means of the continuous street. The damage is special because different not only in degree but in kind from that of the general public. Access imports not merely the means of passing from lot to street, but a means of travel to and from the lot to and from other portions of the city.

"It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is, property, regardless of the extent of such value." *Long v. Wilson*, 117 Iowa 267, 98 N. W. 282, 97 Am. St. 315, 60 L. R. A. 720, 721.

See, also, *Borghart v. Cedar Rapids*, 126 Iowa 313, 101 N. W. 1120, 68 L. R. A. 306; *Webster v. Lowell*, 142 Mass. 324, 8 N. E. 54; *O'Brien v. Central Iron & Steel Co.*, 158 Ind. 218,



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63 N. E. 302, 92 Am. St. 305, 57 L. R. A. 508. None of the decisions of this court cited by the respondent as sustaining the trial court go to that extent.

In *Smith v. St. Paul, Minn. & M. R. Co.*, 39 Wash. 355, 81 Pac. 840, 109 Am. St. 889, the question here involved was not presented. The changes were in a cross-street upon which the plaintiff's property did not abut.

In *Ponischil v. Hoquiam Sash & Door Co.*, 41 Wash. 303, 83 Pac. 316, the lot in question was upon a corner made by two streets. A portion of one of these lying beyond the lot was vacated. The other street upon which the lot also abutted was not interfered with, and through it and the unvacated portion of the first mentioned street and other nearby cross-streets easy access to the lot in all directions remained available. The opinion rests not upon an inadmissibility of evidence but on its insufficiency to show any special damages. Had the vacated street been the only means of access, or had the access been materially impaired, the decision must have been different though the lot did not directly abut upon that part of the street which was vacated. Moreover, the evidence showed that the market value of the property was not diminished by the vacation.

In *Mottman v. Olympia*, 45 Wash. 361, 88 Pac. 579, complaint was made of the vacation of a street beyond that part upon which the plaintiff's property abutted. A cross-street intervened between his property and the vacated part of the street. As in the *Ponischil* case the decision turned upon the insufficiency of the evidence to show any material or special interference with the access to the property; not alone upon the fact that the property did not abut directly upon the vacated part of the street.

In *In re Fifth Avenue and Fifth Avenue South*, 62 Wash. 218, 113 Pac. 762, the changes were in a cross-street upon no part of which the plaintiff's property abutted. The writer of this opinion is inclined to the personal view therein expressed by Judge Gose that "any arbitrary attempt to limit

the right to recover damages to the abutting owner is illogical," and it would certainly be much more illogical to further arbitrarily limit as a matter of law even the abutting owner's right to a recovery of such damages only as he can show will result from the change in that part of the street actually tangent to his property without reference to the fact that the change in the same street extends in either direction. This court has never gone so far and we are not, as in the *Fifth Avenue* case, bound by the doctrine of *stare decisis*.

In the case before us, the trial court in so limiting the evidence and the recoverable damages committed prejudicial error. It will be unnecessary to review the other assignments of error, since what we have said will sufficiently indicate the scope which the inquiry should take on a retrial.

The cause is reversed and remanded for a new trial.

MOUNT, MORRIS, FULLERTON, and CROW, JJ., concur.

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[No. 10343. Department One. August 22, 1912.]

UNION ELEVATOR & WAREHOUSE COMPANY, *Respondent*, v.  
FARMERS' WAREHOUSE COMPANY, *Appellant*.<sup>1</sup>

WAREHOUSEMEN—DELIVERY—BREACH OF CONTRACT—LIABILITY. A warehouseman who loads out wheat, stored under the usual form of warehouse receipt, which was "wet, mouldy and in a growing condition," is liable in damages, where there was no acceptance at the warehouse and no evidence that it was damaged in transit.

APPEAL—REVIEW—EVIDENCE. The credibility of the evidence sustaining a judgment will not be considered on appeal.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered December 1, 1911, upon findings in favor of the plaintiff, in an action of tort, after a trial to the court. Affirmed.

<sup>1</sup>Reported in 125 Pac. 960.

*C. H. Spalding and J. M. Simpson*, for appellant.  
*Lovell & Davis*, for respondent.

CHADWICK, J.—This action was brought by respondent to recover damages, alleged to have been suffered by reason of the fact that appellant loaded out wheat, stored under the usual form of warehouse receipt, that was “wet, mouldy and in a growing condition” when it reached the Tacoma terminal.

Many errors are assigned but, as we view the case, it being largely a question of fact, we shall not discuss them further than to say that we find evidence to sustain the judgment. However, inasmuch as appellant earnestly contends that the effect of the judgment is to make it and other warehousemen liable to meet the tests and exactions of terminal weights and grades, we shall extend this opinion to the extent of saying that we do not so interpret the findings of the lower court. The duty of a warehouseman to turn out wheat is performed when he delivers the specific article on the cars, or, if the receipt be in such form, wheat of like kind and quality. If it had been proven that there was an acceptance at the warehouse, or that the wheat was damaged in transit, appellant might have recovered; but there is ample testimony to sustain the court's findings that the wheat was damaged when loaded. This being so, appellant is liable for its breach of contract.

Counsel have invited us to pass upon the weight of the evidence, saying that the only evidence worthy of belief is with appellant. The judgment being sustained by the evidence, we shall not pass upon its credibility.

Judgment affirmed.

CROW, GOSE, PARKER, and MORRIS, JJ., concur.

[No. 10361. Department Two. August 22, 1912.]

**SEATTLE MATTRESS & UPHOLSTERY COMPANY, *Appellant*, v.  
THE CITY OF SEATTLE, *Respondent*.**

**OLIVER T. ERICKSON *et al.*, *Appellants*, v. THE CITY OF  
SEATTLE, *Respondent*.<sup>1</sup>**

**MUNICIPAL CORPORATIONS—ASSESSMENTS—INTEREST ASSESSABLE.**  
An ordinance providing that the city treasurer shall collect from the owner of any subdivision of a lot such proportion of the assessment thereon as the city engineer shall certify to be chargeable to such subdivision, was not intended to authorize the segregation of a leasehold interest from the fee.

**SAME—ASSESSMENTS—OBJECTIONS—FAILURE TO INCLUDE PROPERTY.**  
An assessment is not invalidated by the failure to assess all the property within the assessment district, in the absence of an affirmative showing that the omitted property was specially benefited, the presumption being that it was not benefited.

**SAME.** The mere fact that real estate omitted from assessment was contiguous to the improvement is not sufficient to overcome the presumption that it was omitted because not benefited.

**SAME—ASSESSMENTS—REVIEW—PARTIES ENTITLED—MODIFICATION.**  
Where the court reduced an assessment against the leasehold and charged part against the fee, the lessee cannot complain that the court had no power to originate an assessment against the fee, the owner of the fee not complaining, and Rem. & Bal. Code, § 7551, providing that the court on appeal may correct or modify the assessment.

**SAME—ASSESSMENTS—APPORTIONMENT—EVIDENCE — SUFFICIENCY.**  
An assessment for a permanent street fill, charging two-thirds of the cost against leaseholds and one-third against the fee, is sustained, where the lease had twenty-one years to run, with the preference right of renewal, the leaseholds received the whole of the present benefit and are relatively more enhanced in value than the fee, and the evidence as to the benefits was conflicting.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 15, 1912, upon findings in favor of the city, modifying an assessment, upon appeal from the confirmation of the city council. Affirmed.

<sup>1</sup>Reported in 125 Pac. 1013.

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*Murphy & Wall*, for appellants.

*James E. Bradford* and *Howard A. Hanson*, for respondent.

ELLIS, J.—This is an appeal from a judgment of the superior court for King county, modifying an assessment, as confirmed by the city council of Seattle, upon certain leasehold interests in the west 120 feet of lots 2, 3, 4, and 5, of block 279, Seattle tide lands. The ordinance pursuant to which the assessment was levied provided for the improvement of Fourth avenue, south, between Seattle boulevard and Holgate street, together with certain other streets, by filling the same. The appellants objected to the assessments, and were accorded a hearing before the city council. Their objections were overruled and the assessments were confirmed by ordinance. The two appeals were taken from this action of the council to the superior court. The appeals were consolidated for trial. The appellants are owners of leasehold interests in the tide land, the fee being in the state. The assessment roll as originally made and confirmed by the council cast the entire burden of the assessment against these tide lands upon the leasehold interests. Among the objections urged before the city council, and made the basis of the appeal to the superior court, was the following:

“That the tax sought to be assessed against the leasehold interests of your objector in said property is as great as the tax levied upon lots and parcels of land upon the same street wherein the fee simple title to the same is in private individuals, and where there is no outstanding leasehold interest or other title.”

The appellants urged before the city council a segregation and apportionment of the assessments between the fee and the leasehold interests. The council refused to make the apportionment. On the appeal after a full hearing the superior court sustained this objection, and by decree modified the assessments by apportioning one-third to the fee and two-thirds to the leasehold interests, and directed the city council to cor-

rect and modify the assessment roll accordingly. From that decision, the appeal to this court was prosecuted.

The appellants contend (1) That the assessments are invalid; (2) That the court had no power to segregate or apportion the assessment between the fee and the leasehold interests; (3) That, if the court had such power, it has not justly exercised it in this case. We will consider these in their order.

(1) It is urged that the assessments were invalid because not made in accordance with a city Ordinance No. 4,165, which authorizes the city treasurer to collect from the owner of any subdivision of any lot or tract upon which an assessment has been or shall be made such portion of the assessment as the city engineer shall certify to be chargeable to such subdivision, in accordance with the provisions of the charter and ordinances in force when the original assessment was made. This ordinance was manifestly not intended as a part of the original proceeding in making the assessment roll, but to provide an easy and convenient mode of segregation for collection of the assessment where title to a part of a lot or parcel against which the assessment was originally levied as a whole has changed ownership. It was never intended to apply to a segregation of *interests*, as a leasehold from the fee but to a segregation of the *tract* or *parcel* by subdivision.

It is also urged that the assessment is void because not made in accordance with the ordinance providing for it, nor in accordance with the city charter. The ordinance provided that the assessment district should have bounds as prescribed by the city charter. The city charter provides that, unless otherwise provided by the ordinance creating it, the assessment district shall extend to the middle of the adjoining blocks. Block 279 of the Seattle tide lands is 660 feet square. The line of the district therefore extended 330 feet back from Fourth avenue, south, which runs along the west side of the block. The lots here in question are 330 feet deep and extend back to the east line of the district. Only the

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west 120 feet of these lots was assessed, though all of the west 270 feet was included in the appellants' leaseholds. The remainder of these lots, comprising the east sixty feet, is owned by and included in the right of way of the Oregon & Washington Railway Company and of the Great Northern Railway Company. This sixty-foot strip is within the half block from Fourth avenue, south. The appellants contend that the failure to place any of the assessment for the improvement upon this sixty-foot strip invalidated the whole assessment. There is no complaint because the assessment was not spread over the entire leaseholds, but only that the railroad land was not assessed. The objection before the council was "that some of the parcels of land specially benefited by said improvement and within said improved district have not been assessed."

The city council, in failing to assess this strip and in overruling this objection and confirming the assessment roll, must have done so upon the ground that in its judgment this strip received no benefit from the improvement. Manifestly, if it was not specially benefited, it could not be assessed, whether lying within or without the district. Neither before the council nor on the appeal to the superior court was any evidence offered by the appellants showing, or tending to show, that this strip was specially benefited, either actually as railroad property or potentially by increasing its value as real estate for any use. While there are many authorities to the contrary, we think that both the better reasons and the more persuasive authorities sustain the view that, in the absence of such evidence, the courts must indulge every presumption in favor of the regularity and propriety of the action of the assessing officer or body. This is a general rule applicable to all official action. To have any standing here, the appellants should have shown affirmatively that the omitted property was benefited. In the absence of such showing, we must presume that it received no benefit and was therefore properly omitted.

"Every reasonable presumption is made in favor of the regularity and propriety of the action of public officers. Accordingly, a property owner who complains of the omission of land from a local assessment must show affirmatively that such land was benefited by such improvement and that the omission thereof was improper. The mere fact that certain land was omitted from the assessment is not sufficient to invalidate the assessment unless the complainant further shows that such property should have been included. The fact that after an assessment has been levied, the city confesses in court that certain property is not benefited thereby, and the court accordingly sets aside such assessment as to such property does not, in the absence of fraud or of a showing that the omitted property was in fact benefited, invalidate the assessment as to the remaining property. The mere fact that contiguous property is not assessed does not invalidate the assessment in the absence of a showing that such property is benefited, where the assessment is to be levied on property benefited and there has been no determination that contiguous property has been benefited." 1 Page and Jones, *Taxation by Assessment*, § 648.

"But counsel seem to regard the mere fact that the evidence shows the existence of a street railway which is not specially assessed, as alone sufficient to impeach the commissioners' report. But we are aware of no rule of law which makes the existence of real estate contiguous to an improvement conclusive evidence that it is specially benefited by the improvement. How could the jury apportion special benefits to the street railway company pursuant to section 31 (sec. 147), *supra*, without evidence of the extent of such benefits? There is no evidence in the record that this street railway is benefited by this improvement. Appellant might, possibly, have reduced its assessment by proving that the street railway was specially benefited and the extent of its benefits. But there can be no presumption in that respect in the absence of evidence." *Chicago, R. I. & P. R. Co. v. Chicago*, 139 Ill. 573-580, 28 N. E. 1108.

See, also, *Culver v. Chicago*, 171 Ill. 399, 49 N. E. 573; *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255; *Holdom v. Chicago*, 169 Ill. 109, 48 N. E. 164; *Warren v. Street Comr's of Boston*, 187 Mass. 290, 72 N. E. 1022; *Beals v. James*,



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173 Mass. 591, 54 N. E. 245; *King v. Duryea*, 45 N. J. L. 258; *City of Kansas v. Baird*, 98 Mo. 215, 11 S. W. 243, 562; *Kansas City v. Bacon*, 157 Mo. 450, 57 S. W. 1045.

(2) In support of the second contention, namely, that the court had no power to apportion the assessment between the leasehold interests and the fee, the appellants argue that they have not had the benefit of the judgment of the city council as to how much of the assessment the fee, and how much the leasehold interests, should bear, and that the court should have remanded the roll with direction to the council to determine these amounts. But this matter had already been before the council. Upon the hearing of appellants' objections, that body had said that the leasehold interests should bear the whole assessment. The statute governing appeals in such cases (Laws 1901, p. 242), declares that:

"The judgment of the court shall confirm, correct, modify or annul the assessment in so far as the same affects the property of the appellant." Rem. & Bal. Code, § 7551.

The jurisdiction of the superior court to reduce the assessment upon the leaseholds was invoked by the appellants themselves. The assessment was modified at their instance. Assuming that the owner of the fee could successfully contest the assessment as to the fee because it was originated by the court instead of the council, we fail to see wherein that assessment is a matter of any concern to these appellants. If the assessments on their leasehold interests have been reduced to equitable amounts in proportion to the benefits, it is a matter of no moment to the appellants whether the assessment on the fee be valid or not or whether it is ever paid or not. Whatever may be said as to the part of the assessment placed upon the fee, there can be no pretense that the court has originated or created an assessment as against the leaseholds. It has merely modified and reduced an assessment already made so far as the leaseholds are concerned.

The case of *Coast Land Co. v. Seattle*, 52 Wash. 380, 100 Pac. 856, cited by appellants, has no bearing upon the case

here presented. There the whole charge was *assessed* against the fee. The action was brought to enjoin a sale of the leasehold to pay the assessment against the fee. The argument was made that the leasehold alone was benefited, and hence it alone should respond to the assessment. The court said:

“Inasmuch as the assessment was not made against its [the land company] interest, but is made upon the entire property, it was not called upon or given an opportunity to contest whether its interest in the property was the sole interest benefited, and it must be given this opportunity before the charge is irrevocably fixed against its interest.”

However pertinent this language might be, as applied to the assessment against the fee in the present case, it is obviously not pertinent as to these appellants. They had their hearing on this very question before the council, and on their appeal to the superior court their assessment was reduced. The appellants had no interest in the assessment of the fee, but only in a reduction of the assessment on their leaseholds. The owner of the fee is not complaining.

(3) Finally, it is urged that, if the assessments are valid and if the court had power to reduce the assessments charged against the leaseholds, the court did not make a sufficient reduction. The leases involved are thirty-year leases and had about twenty-one years to run when the assessments were made. The question was one of special benefits, to be determined on evidence. In the nature of the case, it was not a matter which could be determined with mathematical certainty or exactness. There were almost as many opinions as to the relative benefit to the leaseholds and to the fee resulting from the improvement as there were witnesses. The court heard evidence as to the situation of the property, both before and after the improvement. It reduced the assessment upon the leaseholds by one-third. It is argued that, the fill being a permanent improvement, the fee will receive the greater benefit. That, of course, is in a sense true, but the leases provide that the lessees have the preference right of renewal and

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it is plain that the leaseholds receive the whole of the present benefit. It seems reasonable that the present market value of the leasehold is relatively much more increased by the improvement than is the present market value of the fee. Upon a consideration of the whole evidence we cannot say that it warranted a greater reduction than that made by the court. Finding nothing in the record to justify a reversal, we affirm the judgment.

MOUNT, MORRIS, and FULLERTON, JJ., concur.

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[No. 10094. Department One. August 23, 1912.]

J. D. FINLEY, *Respondent*, v. WESTERN EMPIRE INSURANCE COMPANY OF WASHINGTON, *Appellant*.<sup>1</sup>

INSURANCE—ACCEPTANCE OF POLICY—EVIDENCE—SUFFICIENCY. An acceptance by the assured of a policy of fire insurance issued to take the place of another, is shown, notwithstanding the assured retained the other policy, where the assured at the time of the fire had no knowledge of the attempted substitution which was arranged by an agent acting as factor for both parties; and on being consulted, after the fire, informed the defendant company that he proposed to hang on to all of the policies.

INSURANCE—DEFENSES—ESTOPPEL—PARTICIPATION IN ADJUSTMENT. A fire insurance company admits its liability and is estopped to claim that the policy was not accepted or in force, where it issued and delivered the policy August 22, dating its liability from August 20, and accepted proofs of a loss occurring August 21, and participated in an adjustment based on the validity of four policies that relieved it of one-fourth of its liability, and issued its check therefor.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered May 11, 1911, in favor of the plaintiff upon withdrawing the case from the jury, in an action on a fire insurance policy. Affirmed.

*Charles P. Lund*, for appellant.

*W. W. Zent* and *D. W. Henley*, for respondent.

<sup>1</sup>Reported in 125 Pac. 1012.

CHADWICK, J.—On August 20, 1910, plaintiff held three policies of insurance covering a certain stock of lumber. These policies were written by the New Brunswick, Glenn Falls, and Fireman's Fund insurance companies, each policy being for the sum of \$2,500. The New Brunswick company, being desirous of cancelling its policy, notified its local agents at Spokane to inform the assured of its intention. Instead of acting under the terms of the policy, which called for a five-day notice, the agents, Rogers & Rogers, who seem to have been factors in behalf of the insured as well as the company, immediately set about to secure another contract in lieu of the one the New Brunswick company desired cancelled. This they secured from the defendant, the Western Empire Insurance Company of Washington, on August 20th. The policy was dated August 22, 1910, but was not actually issued and delivered to plaintiff until the 23d. The property was destroyed by fire on the 21st of August. After the fire, a surrender of the New Brunswick policy was demanded. Plaintiff refused to surrender it, but held both. The loss was thereafter adjusted by an independent adjuster, and the loss apportioned between the four companies. Defendant drew its check for the amount awarded by the adjuster—\$1,233.79—and sent it to plaintiff, but stopped payment thereon prior to its presentment at the bank. Upon plaintiff's motion, the case was withdrawn from the jury, and the court adjudged, as a matter of law, that plaintiff was entitled to recover.

This appeal is prosecuted in reliance upon the assertion that the policy of the appellant was not delivered or accepted by the insured prior to the fire, and therefore there can be no liability. Appellant had no notice of the purpose of Rogers & Rogers to cancel the New Brunswick policy and substitute therefor appellant's policy, until after the fire. There were no conditions or limitations attending the contract. It was made in the usual way, and the policy issued in due course, and was made by an attached slip to date from August 20, 1910. The record hardly justifies the assumption that re-

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spondent did not accept the policy of appellant. It shows rather that he accepted it and held it subject to his legal rights in the matter, which, so far as the New Brunswick company is concerned, were adjudicated in *Finley v. New Brunswick Fire Ins. Co.*, 193 Fed. 195. Appellant's agent called on Mr. Finley after the fire, to ascertain whether he intended to make a claim against appellant. He states the substance of the conversation to be that,

"If he had been consulted in the matter, he would have allowed the New Brunswick policy to have been cancelled on the ground that he had shipped out a sufficient amount of lumber to have reduced its value so that the five thousand dollars would practically cover it, but that he had not been consulted and had no knowledge of the issuance of the Western Empire policy nor any knowledge of a requested cancellation of the New Brunswick; but being that the adjuster had been on the ground and had adjusted the loss and had taken into consideration the fact of there being \$10,000 insurance, that he proposed to hang on to all of the policies, as he did not propose to fall between the two stools, that is between the New Brunswick and the Western Empire."

This falls far short of showing a refusal to accept, and when taken in connection with subsequent events, we think appellant was clearly bound to meet its engagement. It issued its policy, dating its liability from August 20; it had delivered the policy and knew of the destruction of the property at the time the loss was adjusted; it accepted proof of loss and participated in an adjustment which proceeded upon the theory that there were four valid policies; it accepted an award that relieved it of one-fourth of its liability, and issued its check therefor. These facts are an admission of liability, and clearly estop appellant from maintaining its allegation, that "it was without notice or knowledge of the fact that said plaintiff had refused to accept said policy, and that the same was not in force at the time of the loss." 19 Cyc. 803.

The case of *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65,

while seemingly in point, is to be distinguished from the case at bar. That case turned on the fact that dealings between insurance agents with reference to placing a risk, and the writing of a policy to take the place of one which the company desired cancelled, were ineffectual to terminate the contract until notice had been given to the assured. Before that was done, the property was destroyed by fire, and it was correctly held that the liability of the cancelling company being fixed by the destruction of the property, there was no liability on the part of the defendant. Or, as stated, "after the liability of the company has become absolute, notice of their previous election to terminate the risk was of no effect." If notice had been given, and the substituted policy been tendered and accepted, the judgment of the court would, no doubt, have been for the defendant. Here Rogers & Rogers, acting as agents for respondent, secured the new policy in order to effect a substitution, so as to keep the property insured up to \$7,500, which, considering the whole record, we think they were authorized to do. Their act was the act of, and their knowledge was the knowledge of, the respondent, and the time limit on the notice of cancellation, being for the benefit of the assured, was waived when they contracted for other insurance. The New Brunswick policy had no binding force after August 20, for the reason that the agreement to take appellant's policy was in legal effect an acceptance of it. In *Ferguson v. Northern Assurance Co.*, 26 S. D. 346, 128 N. W. 125, there was no oral contract for the policy sued on, nor did the assured have notice of the policy. The contract, lacking the element of acceptance, was incomplete, and the court held that a recovery could not be sustained. Other cases are cited by appellant, but they do not militate against the judgment of the trial court.

Affirmed.

GOSE, PARKER, and FULLERTON, JJ., concur.

MORRIS, J. (concurring)—I concur for the reason that this action was brought upon the check. I find no valid

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defense in appellant to such an action under the circumstances under which it was given. I express no opinion as to appellant's liability had the check not been given and the action brought on the policy.

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[No. 10348. Department One. August 24, 1912.]

GLADYS AUSTIN *et al.*, Respondents, v. THE CITY OF  
BELLINGHAM, Appellant.<sup>1</sup>

WATERS AND WATER COURSES—OBSTRUCTION—FLOODING LANDS—LIABILITY OF CITY. A city has no right to so obstruct the outlet of a lake for the purposes of a water supply as to raise the water above high water mark and overflow or injure the lands lying above the line of ordinary high water.

SAME—"BEDS AND SHORES"—STATUTES—"HIGH WATER MARK." Rem. & Bal. Code, § 8005, giving to cities the right to occupy and use the beds and shores of lakes up to the high water mark does not mean the highest water reached during annual flood periods, but means the upland boundary of tide and shore lands separating soil adapted for use from that which is submerged so long or frequently in ordinary seasons that vegetation will not grow upon it.

SAME—FLOODING LANDS—MEANDER LINE. In an action to enjoin the obstruction of the outlet of a lake, raising the water above the line of high water mark, the location of the meander line is immaterial.

SAME—ACTION FOR FLOODING—INJUNCTION—JUDGMENT—FORM. A judgment enjoining a city from obstructing the outlet of a lake is inapt where it prohibits the city from in any manner obstructing the "normal" flow, and should recognize the right of the city to raise the waters to the line of ordinary high water.

SAME—FLOODING LANDS—LIABILITY OF CITY. A city raising the waters of a lake above high water mark is liable to littoral owners for damages resulting from overflow or seepage through and under adjoining soil.

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered February 1, 1912, upon

<sup>1</sup>Reported in 126 Pac. 59.

findings in favor of the plaintiffs, in an action to restrain the flooding of land by the maintenance of a dam. Affirmed.

*Dan F. North, T. L. McFadden, and George Livesey*, for appellant.

*Neterer & Pemberton*, for respondents.

CHADWICK, J.—Lake Whatcom is a navigable body of water, with meandered border. Plaintiffs and their predecessors in interest settled upon lands bordering on the shores of the lake in 1888, and having complied with the public land laws of the United States, patent issued on June 30, 1889.

The city of Whatcom maintains a gravity water system, taking water from the lower end of Lake Whatcom at a point just above its outlet. In order to maintain a proper pressure during the summer months and to insure a greater degree of purity, the city, in April, 1911, put in a mud-sill across the creek bottom and on it put a board dam, the object of which was to raise the waters of the lake. This action was brought by plaintiffs to restrain the city from longer obstructing the free flow of the waters of the lake, alleging that the dam had so raised the waters as to overflow, or to speak more accurately, back the waters into and over the low flat land owned by plaintiffs, and thus render it incapable of improvement and cultivation. From a decree in favor of the plaintiffs, the city has appealed.

The record is long and involved, and appellant has briefed its case upon the theory of fact maintained by it throughout the trial; but inasmuch as the trial judge announced his purpose to view the situation for himself, we are inclined to hold with him that the putting in and maintaining of the dam raised the waters of the lake about eighteen inches above the line of ordinary high water, or enough to seriously interfere with the use and enjoyment of respondents' land.

Appellant contends that owners of land abutting a navigable lake have no right below the line of high water mark; or, to put it the other way, the appellant can, without ad-



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verse legal consequence, raise the water to the line of high water mark.

The cases following *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632, are relied on. These cases are determinative only as we find them to fit the facts of a particular case. In the instant case, there is testimony to the effect that there have been times when the waters of the lake were as high or higher than they were after appellant had installed its dam, and that the grass on plaintiffs' land is largely sedge or swamp grass. But it is also shown that these rises occur only in what may be called flood seasons, following the unusual rains and storms of winter; that, prior to the installation of the dam, lands that are now flooded or saturated had, during the summer months, been cultivated or pastured; that the uncleared portions thereof were covered with tame grass and by a tree growth and stumps, indicating that the land was not swamp or marsh land. It will be seen, therefore, that the cases relied on can support appellant only in the event that we find the lands were flooded at ordinary high water.

While it is true, as we have held many times, that a littoral or riparian owner can assert no valuable rights below the line of ordinary high water, we have not held in any case that the owner of tide and shore lands can so use his property as to injure or destroy the use of abutting property, without meeting the consequential damages. This may be well illustrated by reference to our boom cases. See, *Grays Harbor Boom Co. v. Lonsdale*, 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267, and cases there cited. There, as here, the user of the tide or shore lands was claiming under the express or implied license of the state. In the case of *Burrows v. Grays Harbor Boom Co.*, 44 Wash. 630, 87 Pac. 937, it is said that, "in the interest of appellants' business, the respondents' lands are overflowed by back water." It was there contended that there could be no consequential damages, but this court held otherwise, saying that the user of the stream

was answerable where there had been an "actual permanent taking and permanent use made of respondents' land." And the damages for overflowing the adjacent lands of the upland owner were afterwards assessed.

We mark a difference between damaging of the shore line, or more strictly speaking the destruction of a boundary line, and a damage which is in the nature of a continuing trespass to the abutting lands. The one may be met by an action in damages. The other can be corrected only by resort to a court of equity. The cases cited by appellant go no further than to hold that, under our assertion of title to the tide and shore lands of the state, an upland owner has no littoral or riparian rights.

The city has acted under Rem. & Bal. Code, § 8005:

"And for all the purposes of erecting such aqueducts, pipe lines, dams or waterworks or other necessary structures in storing and retaining water, as above provided, or for any of the purposes provided for by this chapter, such city or town shall have the right to occupy and use the beds and shores up to the high water mark of any such watercourse or lakes, and to acquire the right by purchase, or by condemnation and purchase, or otherwise, to any water, water rights, easements, or privileges named in this chapter, or necessary for any of said purposes, and any such city or town shall have the right to acquire by purchase or by condemnation and purchase any lands, properties or privileges necessary to be had to protect the water supply of such city or town from pollution: Provided, that should private property be necessary for any such purposes or for storing water above high-water mark, such city or town may condemn and purchase, or purchase and acquire such private property."

Faith is put in the grant of a right to occupy and use the beds and shores of navigable lakes and streams up "to high water mark," but the term high water mark must be taken in its relative and not literal sense. High water mark has been defined to be "the upland boundary of tide and shore lands." *Washougal & La Camas Transp. Co. v. Dalles, Portland & A. Nav. Co.*, 27 Wash. 490, 68 Pac. 74.

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“High water mark does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, nor yet does it mean meadow land adjacent to the river, which, when the waters leave it, is adapted to and can be used for grazing or pasturing purposes. The line, then, which fixes the high water mark is that which separates what properly belongs to the river bed from that which belongs to the riparian owner—that is, the owner of adjoining land. Soil which is submerged so long or so frequently, in ordinary seasons, that vegetation will not grow on it, may be regarded as a part of the bed of the river which overflows it.” 4 Words and Phrases, p. 3290, citing *Welch v. Browning*, 115 Iowa 690, 87 N. W. 430.

Nor can it be successfully contended that the state could, by the statute cited, grant some right that it did not possess. Its rights are limited to the line of ordinary high water, and not to the line of the highest water that may be proved.

The case of *Kalex v. Spokane Valley Land and Water Co.*, 42 Wash. 43, 84 Pac. 395, is cited by appellant as decisive of this case. We do not so read it. In that case it was contended that the lake from which waters were being taken was not navigable; or, if so, that that upland owner was entitled to protection as a riparian proprietor against an unlawful diminution of the waters of the lake. The court held that the lake was navigable and therefore that the upland owner could not enjoin an act which affected only the shore lands. A consequential injury to the upland was in no way involved. By consequential injury we mean physical injury. The court there said:

“Were it made to appear that the dam or gates erected, or about to be constructed, by the respondent had or would raise the water above the ordinary high water line, and to the injury of appellants’ property, the court would doubtless furnish relief.”

There being no riparian or littoral rights in the abutting owner, the state may grant the right to lower the water, at least to the line of ordinary low water. But an entirely different question occurs should it attempt to raise the water so as to destroy the use of land lying above the line of ordinary high water.

It is contended that there is no competent testimony fixing the meander line. This question is not now material. The rights of the abutting owner to bar aggressions of the owner of the shore lands or one having a right in the waters in a case where the damage results from back or flood waters, cannot be measured by reference to an arbitrary line, whether it be called a shore or meander line. Whether it be the one or the other, it cannot stop the flow or seepage of the water; and having no such power, although higher than the line of ordinary high water, it cannot be relied on as a legal bar to consequential damages to abutting lands.

In the event of an adverse decision on the merits, we are asked to modify the decision of the lower court. It is said:

“We contend that the decree should be so modified as to permit the maintenance of a dam in the future, provided such dam did not have the effect of backing the water over the property line of respondents.”

The decree of the court is:

“It is therefore by the court considered, ordered, adjudged and decreed that the defendant City of Bellingham, its officers and agents, be and are hereby enjoined and restrained from erecting, constructing or maintaining a dam at the outlet of Lake Whatcom, the source of Whatcom Creek, and that the said defendant be enjoined and restrained from maintaining a dam at the outlet of said lake or the source of the said creek at or near the place where the said dam has been erected and constructed and maintained or at any place near the source of the said outlet so as to retard the natural and normal flow of the water from the said lake and so as to cause the water level in the said lake to be raised above the normal condition. . . . It is further considered, ordered, adjudged and decreed by the court that the said defendant

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city is enjoined and restrained from obstructing the outlet of the said lake in any manner and enjoined and restrained from keeping or placing or causing to be kept or placed in Whatcom Creek at or near the outlet of the said lake, any dam or obstruction of any kind or character which shall interfere with the flow of the water and retard the natural and normal flow of the water at the outlet of said lake through Whatcom Creek."

The reason for requesting a modification is:

"The effect of an affirmation of this judgment *in toto* will be to make it the established law of this state, that a municipal corporation of the first class cannot build a dam of any kind on a navigable lake and must condemn the property of each and every littoral owner on such lake before it can establish a water system, if a dam be necessary for the establishment of such system."

The use of the word "normal" by the trial judge seems inapt. The decree should have provided that the city might raise the waters of Lake Whatcom to the line of ordinary high water, and to this extent the decree should be modified. We hardly think that the decree as written makes it necessary for the city to condemn the littoral rights of an upland owner, for he has none. This case does not involve a question of littoral right. We regard the act of the city rather in the light of a trespass upon the abutting land. The right of the city to raise the waters of Lake Whatcom to the line of ordinary high water is now recognized and confirmed. If it raises the waters higher than this, it must meet the consequences, either in damages or by way of condemnation, and whether the damages result from overflow or seepage through and under the adjoining soil.

Finally, it is contended that the award of damages is excessive. There is testimony to sustain the sum fixed by the trial judge. This, coupled with his view and knowledge of the actual condition, warrants us in refusing to reduce the award.

Affirmed.

PARKER, GOSE, and CROW, JJ., concur.

[No. 10116. Department One. August 24, 1912.]

LAURA E. WISSINGER, *Appellant*, v. T. R. REED *et al.*,  
*Respondents*.<sup>1</sup>

ADVERSE POSSESSION—BOUNDARY LINE—MISTAKE OF FACT. Adverse possession of land for more than ten years under the mistaken belief that the fence inclosing the land was on the true boundary line, with claim of ownership during such period, ripens into title by adverse possession.

Appeal from a judgment of the superior court for Snohomish county, Bell, J., entered May 3, 1911, upon findings in favor of the defendants, in an action to establish a boundary line. Affirmed.

*H. E. Foster*, for appellant.

*H. D. Moore*, for respondents.

PARKER, J.—The plaintiff commenced this action in the superior court seeking a decree establishing what she alleges to be the lost or uncertain boundary between her land and adjoining land of the defendants upon the west, under the provisions of §§ 947-949, Rem. & Bal. Code. The action is in effect one to recover from the defendants a strip of land lying along and immediately to the west of a line up to which they have possession, and which they claim to be the true boundary line between their land and the plaintiff's, and which the plaintiff claims is east of such true boundary line. The defendants interposed two affirmative defenses. One of these was a claim of title by adverse possession to the strip of land involved. The trial court made findings in favor of the defendants upon their claim of adverse possession for so much of the land as they had inclosed by fence, which was practically all of the land involved, and rendered

<sup>1</sup>Reported in 125 Pac. 1030.

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judgment accordingly in their favor. The plaintiff has appealed to this court.

Appellant has record title to the southeast forty acres of a certain quarter section, and respondents have record title to the southwest forty acres of the same quarter section. This results in their common boundary line being a line running northerly and southerly through the center of the quarter section, assuming that their respective titles are in fact as shown by their record titles. Respondents acquired the westerly forty acres by deed of conveyance in April, 1896. At that time the land here involved had been inclosed with a fence by their grantor, with other land included within the west forty-acre tract. The easterly fence of this inclosure runs northerly and southerly some little distance to the east of the line now claimed by appellant as the true boundary line between the two tracts. This fence has been maintained by respondents and the land inclosed thereby occupied and used by them at all times since the year 1896, for pasture and cultivation. Such occupancy has been open and visible to the world during all of this period, and has at all times had the outward appearance of adverse possession and claim of ownership on the part of respondents to all of the inclosed land. This fence has been maintained by respondents under the belief that it was upon the true line between the two forty-acre tracts, at least for more than ten years following their going into possession of the land in 1896. About the year 1909, appellant made known to respondents her claim that the fence was not on the true boundary line between the two forty-acre tracts, and that such line was some distance to the west of the fence. For the sake of argument, we will assume that surveys made about that time support the claim of appellant that the true line between the forty-acre tracts is as claimed by her, and that it then became known to respondents that the fence was not on such line. There is some conflict in the testimony as to the claims of ownership made by respondents after the surveys of 1909 to the land in their

possession between their fence and the true common boundary line of the forty-acre tracts; but we think the evidence fully warranted the trial court in believing that respondents have at all times claimed ownership of all of the inclosed land up to their fence, which they have been in possession of since 1896.

Aside from the question of respondents' claim of ownership in connection with their occupancy and possession of the land since 1896, which question we think the court rightly resolved in respondents' favor, counsel for appellant now contends that, since respondents' claim of title and possession was under a mistake of fact as to the true location of the common boundary line between the two forty-acre tracts, their possession and claim of ownership could not ripen into a title by adverse possession. There are some decisions of other courts which in a measure seem to lend support to this contention; but our former decisions are clearly against such contention. Respondents' adverse possession and claim of ownership of all the land up to their fence having continuously existed from April, 1896, up to the commencement of this action in March, 1910, a period of approximately 14 years, the fact that they were mistaken in the location of the true boundary line between the forty-acre tracts did not prevent such possession and claim of ownership from ripening into title by adverse possession. *McCormick v. Sorenson*, 58 Wash. 107, 107 Pac. 1055, 137 Am. St. 1047; *Naher v. Farmer*, 60 Wash. 600, 111 Pac. 768; *Johnson v. Ingram*, 63 Wash. 554, 115 Pac. 1073. It follows that the judgment must be affirmed. It is so ordered.

MOUNT, CROW, GOSE, and CHADWICK, JJ., concur.



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[No. 10357. Department One. August 24, 1912.]

J. A. STONER, *Respondent*, v. FRANK W. SHULTZ,  
*Appellant*.<sup>1</sup>

DAMAGES—LIQUIDATED DAMAGES OR PENALTY. A contract whereby the vendor of capital stock of a corporation agreed to surrender up three notes for \$3,000 for cancellation, as liquidated damages in case of his failure to effect a settlement of claims aggregating only \$1,800, is an agreement for a forfeiture or a penalty, and only the actual damages sustained by its breach can be recovered; since a larger sum agreed to be paid as security for a less sum cannot be considered as liquidated damages, even if so designated in the contract.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 13, 1911, in favor of the plaintiff, notwithstanding the verdict of a jury rendered in favor of the defendant, in an action upon a promissory note. Affirmed.

*Samuel Edelstein*, for appellant.

*Alex M. Winston* and *Fred H. Witt*, for respondent.

PARKER, J.—The plaintiff commenced this action seeking recovery from the defendant upon a nonnegotiable promissory note, executed in part payment of the purchase price of shares of capital stock of the Standard Motor Car Company, a corporation, of Spokane. The execution of the note, together with two others representing the purchase price of the stock, was admitted by the defendant; but he pleaded as an affirmative defense, in substance, that, under his contract with the plaintiff for the purchase of the stock in part payment of which the note sued upon was given, the plaintiff had failed to do certain things agreed by him to be done which, under the sale contract, were conditions precedent to the defendant's becoming liable upon the notes; or in other words, that the agreement contained in the contract was in effect

<sup>1</sup>Reported in 125 Pac. 1026.

for liquidated damages which would result to the defendant upon the failure of the plaintiff to do certain things agreed by him to be done, and that his failure in that regard resulted in the satisfaction of the debt which was evidenced by the three notes. A trial before the court and a jury resulted in a verdict in favor of the defendant. Thereupon the plaintiff moved for judgment notwithstanding the verdict, and in the alternative for a new trial. The court granted the motion for judgment notwithstanding the verdict and rendered judgment accordingly in favor of the plaintiff and against the defendant for the full amount of the note sued upon with interest, reciting in the judgment as grounds thereof the following:

"The court having heretofore on Friday, December 1st, 1911, announced his decision upon said motions to counsel for each of the parties hereto, and said decision being that the court believed that the provisions in the contract set up in the answer herein were provisions for a penalty and not for liquidated damages, the court thereupon announced, by reason thereof, the said verdict would be set aside and a new trial granted and that defendant might, if he elected so to do, amend his answer to show the actual damage, if any, suffered by defendant by reason of the breach or breaches, if any, by plaintiff of the covenants and conditions in said contract to be by him performed, and that if defendant did not elect to so amend, that judgment would be rendered, notwithstanding said verdict, for the reason that, as aforesaid, the provisions in said contract are, under the evidence, provisions for a penalty and not for liquidated damages, and the said defendant having elected to stand upon his said answer and declining to amend the same,

"It is by the court ordered, adjudged and decreed . . ."

From this disposition of the cause, the defendant has appealed.

There are certain undisputed facts disclosed by the record which we regard as determinative of the correctness of the court's decision. They are as follows: The Standard Motor Car Company is a corporation, with its principal place of business at Spokane, having a capital stock of \$25,000. At

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the time of making of the contract between the parties to this action, portions of which are hereinafter quoted, appellant was the principal stockholder of the Standard Motor Car Company, and then owned nearly all of the shares of stock in that company, excepting thirty shares thereof of the par value of \$3,000 owned by respondent. The Standard Company then, and for some time prior thereto, had an agency contract with the Stoddard-Dayton Motor Company of Los Angeles, Cal., for the sale of Stoddard-Dayton automobiles in Spokane and its tributary territory. At that time, and for some time prior thereto, respondent was the general manager of the Standard Company, being actively engaged in the conduct of its business, and was acquainted with the Stoddard-Dayton people through his dealings with that company. Appellant was not actively engaged in the business of the Standard Company, though the principal stockholder therein, and did not have any acquaintance with the Stoddard-Dayton people. At that time, and for some time prior thereto, there existed two controversies between the Standard Company and the Stoddard-Dayton Company, which, if not amicably adjusted, might result in the termination of the agency contract by the Stoddard-Dayton Company. If these controversies were amicably settled, it is apparent that all cause for or desire on the part of the Stoddard-Dayton Company to terminate the agency contract would be removed. One of these controversies was because of the refusal of the Standard Company to settle with the Stoddard-Dayton Company the claim of that company for a limousine body which had been shipped by it to the Standard Company and for which it had made a charge of \$1,080, settlement being refused by the Standard Company upon the terms demanded by the Stoddard-Dayton Company by reason of defects in the body, claimed by the Standard Company to exist.

The other of these controversies was because of the refusal of the Standard Company to settle with the Stoddard-Dayton

Company the claim of that company amounting to approximately \$700 for parts shipped by it to the Standard Company to carry in stock to supply broken parts of machines; the Standard Company insisting that these parts were only received by it on consignment, while the Stoddard-Dayton Company insisted that they were sold to the Standard Company and that it make payment therefor. It is plain from the record that the settlement of these two claims by the Standard Company with the Stoddard-Dayton Company would have removed all the differences existing between the two companies, and that nothing else threatened the termination of the agency contract. The affairs of the Standard Company being in this condition so far as its relation with the Stoddard-Dayton Company was concerned, on December 10, 1910, the parties to this action entered into a written contract for the sale by respondent of his 30 shares of stock to appellant, the portions of which contract material to our present inquiry are as follows:

“Memorandum of Agreement, entered into this 10th day of December, 1910, by and between Frank W. Shultz, first party, and J. A. Stoner, second party, Witnesseth:

“(1) Second party shall immediately upon the execution and delivery of this agreement in duplicate, assign and deliver to the first party thirty shares of the capital stock of the Standard Motor Car Company, a corporation organized under the laws of the State of Washington, and also execute and deliver to the first party an assignment to the first party of all of the rights of the second party of every nature whatsoever created in favor of the second party under and by virtue of an agreement entered into between the second party and the Standard Motor Car Company, a corporation, as appears from the minutes of the trustees meeting of said company bearing date October 28th, 1909, wherein, among other things, the said company, in consideration of the services of the second party as general manager, the second party is to receive in addition to his salary, one-fourth of the profits of said corporation for the ensuing year, etc.

“(2) Upon the delivery of said certificates of stock and the assignment aforesaid, the first party agrees to pay to

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the second party the sum of \$1,250, the receipt whereof is hereby acknowledged, and the first party will also sign and deliver his three promissory notes each payable to the second party and each in the sum of \$1,000, bearing interest from date until paid at 8 per cent. per annum, one note payable on or before February 1, 1911; one note payable on or before March 1, 1911, and one note payable on or before April 1, 1911.

“(3) That said notes and the cash payment aforesaid are given to the second party upon the express agreement and condition that the second party shall and will, on or before January 10, 1911, fully adjust and settle, to the satisfaction of the first party and the officers of the Standard Motor Car Co., each and all of the differences and disagreements now existing between the Standard Motor Car Co., and the Stoddard-Dayton Motor Company, of Los Angeles, Calif., a corporation organized under the laws of the state of California, and will also receive from the said Stoddard-Dayton Motor Co. and deliver to the first party a written assurance to the effect that said Stoddard-Dayton Motor Co. will fully and promptly comply with a fair and liberal construction of the terms of the Automobile Subagency Contract for the season of 1911 and the supplemental agreement thereto, both bearing date the 8th day of September, 1910, entered into between the Stoddard-Dayton Motor Company and the said Standard Motor Car Company, both of which said agreements are hereby referred to and made a part of this agreement to all intents and purposes as though herein set forth in full. It is further agreed that said written assurances shall be of such a nature as to satisfy the first party that the Standard Motor Car Company aforesaid will receive at the hands of the Stoddard-Dayton Motor Company the same prompt and satisfactory treatment for the season of 1911 as has been received by the said J. A. Stoner and the Standard Motor Car Company in the past before said disagreements now existing arose. The first party agrees that he and the remaining officers of the Standard Motor Car Company will assist the second party as far as reasonable in bringing about an adjustment of said differences, and will comply with a fair and liberal construction of the terms of said automobile contract and supplement.

“(4) It is further expressly understood and agreed be-

tween the parties hereto that in the event the second party shall fail or refuse, within the time aforesaid, to fully comply with the terms of the preceding paragraph, or in the event the said Stoddard-Dayton Motor Company of Los Angeles, California, shall fail or refuse to make an adjustment of the differences and disagreements aforesaid, or shall fail or refuse to give the written assurances aforesaid, then and in either of said events the said second party agrees to accept the said payment of \$1,250 in full accord and satisfaction for the stock aforesaid and the assignment aforesaid, and said second party further agrees in either of said events to surrender up to the first party the three notes aforesaid for cancellation, said unpaid three notes for \$3,000 to be considered as liquidated damages sustained by the first party by reason of the breach of the terms of this agreement aforesaid, and the first party shall be released from any and all obligations to pay any further sum to the second party by reason of the assignment of said stock and the assignment of the rights of second party in said corporation."

On February 1, 1911, the date of the maturity of the first note, this action was commenced by respondent to recover the amount due thereon. Upon the trial, appellant offered no evidence of the amount of his actual damages sustained on account of the failure of the respondent to settle the differences between the Standard Company to the Stoddard-Dayton Company, but relied entirely upon the provisions of the stock sale contract above quoted referring to the conditions upon which the notes were given and the so-called liquidated damages, insisting that no proof of actual damages was required from him to successfully defend against the notes sued upon, but that he was only required to prove that respondent had failed to adjust the differences between the two companies, in order to entirely defeat recovery of the debt evidenced by the notes. It is not claimed that respondent was to adjust these differences at his own expense, but that he was to adjust them upon the basis claimed as correct by the Standard Company and without yielding to the demands of the Stoddard-Dayton Company. It is apparent that the settlement of these differences was left in his hands because

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of his acquaintance with the Stoddard-Dayton people. The verdict of the jury in favor of the defendant of course amounts to a finding that he did not settle these differences, which fact we will assume as proven. The verdict must have been by the jury rested alone upon this fact and the apparent letter of the stock sale contract, since there was no proof of actual damage to appellant offered by him.

It is at once manifest that these differences could have been completely adjusted by the Standard Company by paying the claims of the Stoddard Company, and thereby sustaining a possible loss in no event exceeding the amount claimed by the Stoddard-Dayton Company. That is, not exceeding the sums of \$1,080 and \$700, and in all probability much less; for it is evident that the limousine body and the parts in stock were of considerable value, and these of course would in any event have become the property of the Standard Company upon payment of these claims. It of course follows that the loss or damage to appellant by such a settlement would in no event have been more than these sums, as a stockholder of the Standard Company, since the value of his stock would not have been lessened more than the loss to the company from such a settlement. The evidence shows that these differences were thereafter settled by appellant for the Standard Company at a less loss than the amount of these sums, though that is of little moment here.

It seems to us that, when these parties entered into this contract for the sale of this stock, wherein respondent agreed to settle these differences, it could then be readily seen that the amount of damage which might result to appellant from a failure of respondent to perform that part of his contract would be readily ascertainable. It could even then be seen that the maximum amount of such damages could in no event exceed the total amount of the two claims of the Stoddard-Dayton Company, which it will be noticed did not exceed \$1,800, and was approximately \$1,200 less than the \$3,000 indebtedness evidenced by the notes given by re-

spondent to appellant in part payment of the purchase price of the 30 shares of stock, all of which indebtedness he is now insisting was satisfied by respondent's failure to settle the differences between the two companies.

These facts, it seems to us, render the law of the case comparatively free from difficulty. Appellant's contentions are no different in principle than they would be were he now insisting that respondent owed him \$3,000 as stipulated damages, and such damages in that amount were being set up by him as an offset against his indebtedness to respondent upon these notes. In its last analysis, his claim is that his debt is satisfied by liquidated damages, the amount of which is fixed by the stipulation of the stock sale contract, growing out of respondent's failure to perform certain things therein agreed to by him, and that appellant is thereby freed from the necessity of offering proof of his actual damages. Now if the stipulations of the contract are in effect valid stipulations providing for liquidated damages, appellant's position is well founded. But if they are in effect stipulations providing for a forfeiture as a penalty by respondent of the \$3,000 due from him to appellant because of respondent's failure to effect a settlement of the differences between the two companies, then under well settled rules appellant can only recover, or offset as in this case, which amounts to the same thing, his actual damage caused by such failure. 1 Sutherland, Damages (3d ed), § 283.

That these stipulations are in effect agreements for a penalty in the sum of \$3,000 to be suffered by respondent for failure to effect settlement of the differences between the two companies, which failure could in no event damage appellant more than \$1,800, seems to us plain. This being true, the appellant is not entitled to enforce the whole of such penalty in satisfaction of damages, which as we have seen could in no event amount to but little more than half of the amount claimed by appellant, under the guise of agreed liquidated damages; but he is required to prove the amount of



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his actual damages and can be awarded no more. The law controlling the rights of parties under contracts of this nature was quoted approvingly by this court from Pomeroy's Equity Jurisprudence, in *Johnson v. Cook*, 24 Wash. 474, 478, 64 Pac. 729, as follows:

"First. Wherever the payment of a smaller sum is secured by a larger, the larger sum thus contracted for can never be treated as liquidated damages, but must always be considered as a penalty.

"Second. Where an agreement is for the performance or nonperformance of only one act, and there is no adequate means of ascertaining the precise damage which may result from a violation, the parties may, if they please, by a separate clause of the contract, fix upon the amount of compensation payable by the defaulting party in case of a breach; and a stipulation inserted for such purpose will be treated as one for 'liquidated damages,' unless the intent be clear that it was designed to be only a penalty."

This doctrine is again noticed at some length in *Madler v. Silverstone*, 55 Wash. 159, 104 Pac. 165, 34 L. R. A. (N. S.) 1, where our previous decisions are reviewed.

It is true that it is stated in the contract that in the event of the failure of respondent to make settlement of the differences between the two companies "he is to surrender up to the first party the three notes above for cancellation, said unpaid three notes for \$3,000 to be considered as liquidated damages sustained by the first party [appellant] . . . ." But the mere naming of the amount as "liquidated damages" does not necessarily make it so. We are not controlled by the mere name by which parties may designate an obligation of one to the other, when the substance of their contract shows that such name is erroneously used. *Erickson v. Green*, 47 Wash. 613-615, 92 Pac. 449; *Styers v. Stirrat & Goetz Inv. Co.*, 65 Wash. 676, 679, 118 Pac. 896; *Condon v. Kemper*, 47 Kan. 126, 27 Pac. 829, 13 L. R. A. 671. The latter case contains an exhaustive review of the subject, and together with the note in 13 L. R. A. is particularly appli-

cable as indicating the slight attention the courts will give to the name used by parties as designating their respective legal obligations when the true nature of such obligations is clearly deducible from the terms of their contract.

We are of the opinion that, in view of the admitted facts that the note sued upon was duly executed and delivered to respondent by appellant, that appellant has offered no evidence as to his actual damages by reason of respondent's failure to settle the difference between the two companies, and that the stipulations of the stock sale contract are in effect stipulations providing for a penalty rather than liquidated damages, respondent was entitled, as a matter of law, to a directed verdict in his favor for the amount due upon the note sued upon, or for a judgment to that effect notwithstanding the verdict, as was ultimately awarded to him by the trial court. It follows that the judgment should be affirmed. It is so ordered.

MOUNT, MORRIS, GOSE, and CHADWICK, JJ., concur.

July 1912]

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[No. 10196. Department Two. June 11, 1912.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY A. LAKE,  
*Appellant*.<sup>1</sup>

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 7, 1911, upon a trial and conviction of false registration. Reversed.

*Gill, Hoyt & Frye* and *R. L. Blewett*, for appellant.

PER CURIAM.—Defendant was charged with the crime of false and fraudulent registration, and appeals from a judgment entered upon a verdict of guilty. The error alleged is the insufficiency of the information. The case is similar to *State v. Ross*, 66 Wash. 138, 119 Pac. 20, affirmed by the court on rehearing *en banc* (*Id.*, p. 141, 122 Pac. 8), and to *State v. Cohen*, 67 Wash. 618, 700, 122 Pac. 9, 10, and for the reasons there given the judgment is reversed, and the cause remanded with instructions to dismiss.

[No. 10213. Department One. July 15, 1912.]

W. R. CUNNINGHAM, SENIOR, *Respondent*, v. J. C. STEPHENS, as *Road Supervisor, et al., Appellants*.<sup>2</sup>

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 23, 1912, upon findings in favor of the plaintiff, in an action for an injunction. Reversed.

*John Truax*, for appellants.

*C. H. Spalding* and *Walter Staser*, for respondent.

PER CURIAM.—The same questions are raised in this case as were raised in the case of *Wedemeyer v. Crouch*, 68 Wash. 14, 122 Pac. 366, and for the reasons therein assigned the judgment of the lower court is reversed.

<sup>1</sup>Reported in 124 Pac. 1135.

<sup>2</sup>Reported in 124 Pac. 1134.

[No. 9350. *En Banc*. July 27, 1912.]

CHICAGO, MILWAUKEE & PUGET SOUND RAILWAY COMPANY, *Appellant*,  
v. FRANK H. THAYER *et al.*, *Respondents*.<sup>1</sup>

Appeal from a judgment of the superior court for King county, Gay, J., entered December 22, 1910, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

*F. M. Dudley, H. H. Field, and Charles S. Gleason*, for appellant.  
*Jay C. Allen*, for respondents.

ON REHEARING.

PER CURIAM.—On appellant's petition a rehearing *en banc* has been granted in this action. After such rehearing, the majority of this court conclude that the result heretofore reached, and the judgment ordered by this court in its former opinion, 65 Wash. 402, 118 Pac. 318, should be sustained.

It is therefore ordered that the judgment of the superior court be affirmed.

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[No. 9510. *En Banc*. July 27, 1912.]

W. H. FLUHART, *Respondent*, v. SEATTLE ELECTRIC COMPANY,  
*Appellant*.<sup>2</sup>

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 24, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian struck by a street car. Reversed.

*James B. Howe and A. J. Falknor*, for appellant.  
*Douglas, Lane & Douglas*, for respondent.

ON REHEARING.

PER CURIAM.—On respondent's petition a rehearing *en banc* has been granted in this action. After such rehearing, the majority of this court conclude that the opinion heretofore filed herein, 65 Wash. 291, 118 Pac. 51, should be sustained.

It is therefore ordered that the judgment of the superior court be reversed, and that the cause be remanded with instructions to dismiss.

<sup>1</sup>Reported in 124 Pac. 1126.

<sup>2</sup>Reported in 124 Pac. 1127.

Aug. 1912]

Opinion Per Curiam.

[No. 9573. *En Banc*. July 29, 1912.]R. H. McELROY, *Respondent*, v. G. W. GATES, *Appellant*.<sup>1</sup>

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 24, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on promissory notes. Affirmed.

*Higgins, Hall & Halverstadt*, for appellant.*James W. Reynolds*, for respondent.

## ON REHEARING.

PER CURIAM.—Upon a rehearing of this case *en banc*, a majority of the court have concluded that the residence of the defendant at the time the contract was entered into continues to be his residence for the purposes of the contract, and the fact that he was out of the state when the notes became due and remained out did not change his residence so as to set the statute of Missouri in operation. The right of the plaintiff to bring the action in Missouri was therefore unaffected by the defendant's absence or residence elsewhere thereafter. We are satisfied that the correct result was reached in the department decision heretofore rendered. *McElroy v. Gates*, 64 Wash. 249, 116 Pac. 845.

[No. 9777. Department One. August 14, 1912.]

TONY CHARBADJIEFF, *Appellant*, v. O. C. GROFF *et al.*, *Respondents*.<sup>2</sup>

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 31, 1911, upon findings in favor of the defendant, dismissing an action on contract, after a trial before the court without a jury. Affirmed.

*Willis H. Merriam*, for appellant.*Cohn & Rosenhaupt*, for respondents.

PER CURIAM.—This action was commenced by Tony Charbadjieff against O. C. Groff, to rescind a contract of sale and recover the purchase money paid thereon. The trial court made findings in favor of defendant and entered an order of dismissal. The plaintiff has appealed.

<sup>1</sup>Reported in 124 Pac. 1127.<sup>2</sup>Reported in 125 Pac. 765.

Appellant claims that he purchased from respondent a tailor shop in the city of Spokane, for which he paid \$800; that to induce appellant to make the purchase, respondent, who seems to be conducting a large merchant tailoring business in Spokane, agreed to give appellant all of his tailor work; that after full payment of the purchase price, respondent refused to give appellant any work; that the value of the shop without the work did not exceed \$200; and that appellant rescinded the contract, offered a return of the shop, and demanded repayment of the purchase price. Respondent denied that he made the sale; claimed that the shop was sold to the appellant by one Silver subject to a chattel mortgage held by respondent; that the purchase price was applied to the payment of the mortgage; that respondent made no promise of work to appellant; that he did give appellant work which he was unable to do; and that later appellant refused to accept further work unless he received all that respondent had, which respondent contends appellant was unable to perform.

Issues of fact only are involved on this appeal. The trial judge saw the witnesses, heard them testify, passed upon their credibility, resolved the conflicting evidence in favor of respondent, and found that respondent did not make the alleged contract. We have carefully read the evidence and conclude that it sustains the findings made.

The judgment is affirmed.

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[No. 10230. Department One. August 16, 1912.]

BANK OF LIND, *Appellant*, v. G. H. THOMAS *et al.*, *Respondents*.<sup>1</sup>

Appeal from an order of the superior court for Adams county. Pendergast, J., entered November 27, 1911, dissolving an attachment, after a hearing before the court upon affidavits. Reversed.

*Wakefield & Witherspoon* (A. C. Shaw and E. P. Twohy, of counsel), for appellant.

*Lovell & Davis*, for respondents.

PER CURIAM.—This is an appeal from an order dissolving an attachment. The facts involved are substantially the same as in *Holt Mfg. Co. v. Thomas*, ante p. 488, 125 Pac. 772, which we have just decided. For the reasons given in that decision, the order dissolving the attachment in this case is reversed.

<sup>1</sup>Reported in 125 Pac. 776.

Aug. 1912]

Opinion Per CHADWICK, J.

[No. 10402. Department One. August 19, 1912.]

WILLIAM G. PRATT *et al.*, *Appellants*, v. THE CITY OF SPOKANE,  
*Respondent*.<sup>1</sup>

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered January 30, 1911, dismissing an action to cancel an assessment, upon sustaining a demurrer to the complaint. Reversed.

*John Salisbury*, for appellants.

*A. M. Craven* and *Wm. E. Richardson*, for respondent.

PER CURIAM.—The judgment in this case is reversed on the authority of *Cook v. Spokane*, ante p. 526, 125 Pac. 776, and the cause is remanded for further proceedings.

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[No. 10494. Department One. August 19, 1912.]

W. H. LAFAYETTE, *Respondent*, v. DAVID DEAN, *Appellant*.<sup>2</sup>

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered September 6, 1911, upon findings in favor of the plaintiff, in an action on contract, after a trial to the court. Affirmed.

*D. W. Henley*, for appellant.

*H. J. Hibschan*, for respondent.

CHADWICK, J.—This is an action on an account stated, to recover a balance of \$1,161.67, growing out of certain transactions between the plaintiff and the defendant. It appears from the testimony that, on the 28th day of February, 1910, the plaintiff and the defendant entered into a written contract, under the terms of which the defendant took over and agreed to operate a sawmill and logging outfit which the plaintiff held under a contract of purchase from one Wertz, the owner. The mill was operated by the defendant until on or about April, 1910, and on or about August 1, 1910, the defendant rendered an account to the plaintiff for the above amount, showing the balance due the plaintiff on account of lumber sold from the mill. The case was tried before the court without a jury. The court found, among other things, that operations under the contract

<sup>1</sup>Reported in 125 Pac. 777.

<sup>2</sup>Reported in 125 Pac. 952.

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were suspended and the contract abandoned by mutual consent, on or about April 1, 1910, and that on or about August 1, 1910, an account was stated between the plaintiff and the defendant, showing a balance due plaintiff as alleged in the complaint, for which amount, less certain credits, judgment was entered. From this judgment, the defendant has appealed.

The findings of the court are amply sustained by the testimony, and according to our usual practice in such cases, the judgment must be affirmed. It is so ordered.

CROW, GOSE, and PARKER, JJ., concur.

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[No. 10129. Department Two. August 21, 1912.]

BLAINE GOLD MINING COMPANY, *Appellant*, v. FERRY COUNTY *et al.*,  
*Respondents*.<sup>1</sup>

Appeal from a judgment of the superior court for Ferry county, Pendergast, J., entered April 3, 1911, dismissing an action to set aside a tax sale, upon sustaining a demurrer to the complaint. Affirmed.

*John Salisbury* and *E. O. Macdonald*, for appellant.

*Frank M. Allyn*, for respondent Ritter.

PER CURIAM.—This is an action brought by the plaintiff to set aside the sale of a mining claim made by the county of Ferry to enforce the payment of delinquent taxes. The assignments of error made by the appellant question the sufficiency of the summons by which the appellant was sought to be brought into court in the tax foreclosure proceeding and the sufficiency of the record as to notice of the tax foreclosure sale. The proceeding questioned was a general tax foreclosure proceeding in which the county of Ferry foreclosed in one action all of the delinquency certificates that had been issued to the county. The questions presented were before us in the case of *Old Republic Min. Co. v. Ferry County*, ante p. 600, 125 Pac. 1018, where they were passed on adversely to the contentions made by the appellant. On the authority of that case, the present case will stand affirmed.

<sup>1</sup>Reported in 125 Pac. 1021.



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Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**.

**APPORTIONMENT:**

Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 25, 35.

**APPROPRIATION:**

Of water rights in public lands, see **WATERS AND WATER COURSES**, 1, 2.

**ARREST:**

See **MALICIOUS PROSECUTION**, 4.

**ASSAULT AND BATTERY:**

Conviction of as lesser offense, see **INDICTMENT AND INFORMATION**, 2.

**ASSESSMENT:**

Compensation for property taken or injured for public use, see **EMINENT DOMAIN**, 8.

Of expenses of public improvements, see **MUNICIPAL CORPORATIONS**, 14-38.

Of tax, see **TAXATION**, 1, 2, 4.

**ASSIGNMENT OF ERRORS:**

See **APPEAL AND ERROR**, 9, 10.

**ASSIGNMENTS:**

1. **ASSIGNMENTS—PROPERTY ASSIGNABLE—AGENCY WITH INTEREST.**  
Where property is held in trust for an agent, and subject to an accounting for profits, the agent's interest is assignable. *Oriental Realty Co. v. Taylor*..... 115

**ASSUMPTION:**

Of debt by purchaser of mortgaged property, see **CHATTEL MORTGAGES**, 1.

Of risk by employee, see **MASTER AND SERVANT**, 5-7.

Of risk by person injured, see **NEGLIGENCE**, 6.

Of facts in charge to jury, see **TRIAL**, 2.



**ATTACHMENT:**

1. **ATTACHMENT—GROUNDS—DISPOSING OF PROPERTY TO HINDER CREDITORS—EVIDENCE—SUFFICIENCY.** There is sufficient evidence to support an attachment on the ground that the debtors had disposed of their property with intent to defraud their creditors, where it appears that the debtors were insolvent, and owed four principal creditors \$34,000, that they had property of the value of \$24,000 to \$30,000, all of which they transferred by absolute conveyances to a creditor whose claim was \$5,000 who made inconsistent statements and claimed at first, according to several witnesses, that he took the property as security for his claim and a surety claim of \$6,000 and afterwards offered to pay off other creditors who were not consulted; and there was evidence that the debtors' purpose was to prevent the attaching creditor from carrying out threats to enforce its claim by suit; the fact that they intended to prefer a creditor, as claimed by them, not being sufficient to warrant a dissolution of the attachment, where it appears that they also intended to hinder and delay other creditors and that the preferred creditor aided therein. *Holt Manufacturing Co. v. Thomas*..... 488

**ATTENDANCE:**

Compulsory attendance at public school, see **SCHOOLS AND SCHOOL DISTRICTS**, 4, 5.

**ATTORNEY AND CLIENT:**

1. **ATTORNEY AND CLIENT—APPEARANCE—EMINENT DOMAIN—PROCEEDINGS.** Where a railroad company had agreed to pay the damages awarded against a city in a street condemnation, it had a direct interest in the proceedings and it was not error to allow its attorney to represent the city. *Spokane v. Thompson*..... 650

**AUTHORITY:**

Of insurance agent, see **INSURANCE**, 1.  
 Of city to construct bridge, see **MUNICIPAL CORPORATIONS**, 11.  
 Of city to make reassessment for cost of improvement, see **MUNICIPAL CORPORATIONS**, 31-34, 38.  
 Of notary to administer oath, sufficient to support perjury charge, see **PERJURY**.  
 Of agent to waive conditions in indemnity bond, see **PRINCIPAL AND SURETY**, 2.  
 Of county superintendent to dissolve consolidated district, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

**AUTOMOBILE INSURANCE:**

See **INSURANCE**, 5.

**BAIL:**

1. **BAIL—FORFEITURE—VACATION OF JUDGMENT—DISCRETION.** Rem. & Bal. Code, § 2233, providing that, if, upon a stay of execution against sureties on a bail bond, the person bailed shall be produced in court before expiration of the stay, the court may vacate the judgment against the bail on such terms as may be just and equitable, imposes a judicial discretion on the trial court, and not one that can be exercised arbitrarily. *State v. Johnson*..... 612
2. **SAME—ABUSE OF DISCRETION—GOOD FAITH OF BAIL.** Under Rem. & Bal. Code, § 2233, providing that the court may vacate a judgment on a bail bond, if the person bailed is produced in court before the expiration of a stay of execution, it is an abuse of discretion to refuse to vacate the judgment, where, on a charge of grand larceny, there had been several adjournments of the trial of accused, who was advised by her attorney that the state was indifferent about prosecuting, that she might leave the city, and that he would notify her if the case was set for trial, and it appeared that she had no notice of the trial, and none could be given her, that her bail acted in good faith and spent considerable money in attempting to locate her without success; and after judgment forfeiting the bail bond, accused, upon learning of the same, returned and surrendered herself to the court before expiration of the stay. *State v. Johnson*. 612
3. **SAME—JUDGMENT ON BAIL BOND—ENTRY—DATE—STAY.** The clerk's journal entry of a judgment forfeiting a bail bond, is not the judgment governing the sixty-day stay of execution thereon within which the accused could be produced, where it was informal and did not specify the amount, being in effect an order of default, and was so construed by the prosecuting attorney, who six weeks later entered a formal judgment for the amount of the bond; as the latter would, in any event, have the effect of vacating the earlier one and estop the state from denying that it was the judgment for all purposes. *State v. Johnson*..... 612

**BAILMENT:**

See WAREHOUSEMEN.

**BANKS AND BANKING:**

Liability for money received with knowledge of fraud, see MONEY RECEIVED.

Taxation of banks and bank stock, see TAXATION, 1, 2.

**BAR:**

Of action by former adjudication, see JUDGMENT, 5-7.

Of action by limitation, see LIMITATION OF ACTIONS.

**BENEFITS:**

Deduction of benefits from damages in condemnation proceedings, see EMINENT DOMAIN, 8.

To property from public improvement, see MUNICIPAL CORPORATIONS, 26-29.

**BEQUESTS:**

See WILLS.

**BIAS:**

Of judge, see VENUE.

**BILLS AND NOTES:**

Note as settlement of liability for illegal issue of stock, see CORPORATIONS, 1.

Rate of interest in mortgage note, see INTEREST.

Payment by note, see PAYMENT.

1. **BILLS AND NOTES—CONSIDERATION—ACCOMMODATION INDORSEMENT.** Where a *bona fide* purchaser of illegally issued stock surrendered the same to the corporation in consideration of the promissory note of the company, due in three months, indorsed by another, the acceptance of the note is a settlement of the cause of action against the corporation and an extension of time for payment of the debt, and is a sufficient consideration for the note as between the payee and an accommodation indorser. *Hobson v. Marsh*..... 326
2. **SAME.** In such a case, that the illegal stock was retained as security for the payment of the debt, or that the stock certificate was void, does not affect the consideration for the note. *Hobson v. Marsh* ..... 326
3. **BILLS AND NOTES—HOLDER IN DUE COURSE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** In an action on a promissory note, the plaintiff has sustained the burden of proving that he is a holder in due course, as required by Rem. & Bal. Code, § 3450, where it appears that the note for \$2,000 was given in payment of stock and was within a few days sold and indorsed to a corporation in payment of a stock subscription, and in a few weeks sold and indorsed by the corporation for \$1,900 paid in cash, neither indorsee having any notice of fraud, and that the maker himself did not learn for two months that he had been defrauded; since (1) plaintiff purchased in good faith, within Rem. & Bal. Code, § 3447, and (2) derived his title through a holder in due course, within Rem. & Bal. Code, § 3449. *Wells v. Duffy* ..... 310
4. **SAME—HOLDER IN DUE COURSE—NOTICE OF DEFECTS—EVIDENCE—SUFFICIENCY.** The fact that a note for \$2,000 was discounted \$100, and that the purchaser relied entirely on the credit of the indorser, does not impart notice of a defect in title so as to render him not

## CANCELLATION OF INSTRUMENTS—CONTINUED.

1. CANCELLATION OF INSTRUMENTS—DEEDS—FRAUD AND DURESS—EVIDENCE—SUFFICIENCY. A claim of fraud and duress in securing a deed from the plaintiff in a settlement is not established, where there was evidence that she took the advice of counsel and executed the deed after being advised not to do so; that defendant's threatened foreclosure of a mortgage placed her in no danger, and that she accepted the benefits accruing to her through the settlement and had not offered to return the same. *Drew v. Bouffleur*.... 610
2. CANCELLATION OF INSTRUMENTS—FRAUD—EVIDENCE—SUFFICIENCY. Fraud by the grantee, as ground for the cancellation of deeds, must be proved by clear and convincing evidence, and is not shown by the mere breach of the vendee's contract to pay certain debts as part of the consideration; since the necessary preconceived intention not to perform is not established merely by subsequent failure to perform. *Hewett v. Dole*..... 163
3. CANCELLATION OF INSTRUMENTS—ACTION FOR FRAUD—RELIEF—FAILURE OF CONSIDERATION—DAMAGES. In an action to cancel deeds for fraud, under a complaint asking general relief, the plaintiff may be given damages for partial failure of consideration although failing to establish the fraud. *Hewett v. Dole*..... 163

## CARRIERS:

1. CARRIERS—OF GOODS—CONNECTING CARRIERS—NEGLIGENCE—LIABILITY OF INITIAL CARRIERS—RESHIPMENTS. Where a car load of shingles was shipped over connecting lines to its destination in Illinois, and from there, without notice to the initial carrier, reshipped over other lines to a new point of destination in New Jersey, where it arrived in a damaged condition, the initial carrier's responsibility ended with the arrival of the shingles at the destination named in its bill of lading; and the fact that a connecting carrier at St. Paul removed the shingles from a box car to an open car without notice to the shipper, does not show negligence in forwarding the shingles to their destination in Illinois, nor render the initial carrier liable for damage by reason of reshipping in open cars, in the absence of evidence that the shingles were damaged on arrival at the first destination in Illinois. *Parker-Bell Lumber Co. v. Great Northern R. Co.* ..... 123
2. CARRIERS—INJURIES TO PERSONS ON TRACK—EVIDENCE—INSTRUCTIONS. In an action for injuries by one run over by a street car, where plaintiff, who had been drinking, claimed that he was knocked down by a west-bound car and thrown across parallel tracks and run over by an east-bound car while unconscious from the first accident, and there was no other evidence as to how he came to be on the tracks, or that he could have been discovered in that position in time to stop the east-bound car, the defendant is entitled to

**BOUNDARIES:**

- See MUNICIPAL CORPORATIONS, 1, 2.
- Possession under mistaken boundary line, see ADVERSE POSSESSION, 2.
- Description of in deed, see DEEDS, 1.
- Subject and title of act extending boundaries of city into adjacent navigable waters, see STATUTES, 2.

**BREACH:**

- Of contract, see CONTRACTS; SALES.
- Damages for breach of contract, see DAMAGES, 1, 2.
- Of warranty, see INSURANCE, 5, 7-9.
- Filing claim for damages for breach of contract, see MUNICIPAL CORPORATIONS, 42.
- Of covenants of title, liability of agent, see PRINCIPAL AND AGENT.
- Of contract by warehouseman, see WAREHOUSEMEN.

**BRIDGES:**

- Construction by city, see MUNICIPAL CORPORATIONS, 11, 12.
- Negligence in construction of overhead highway bridge, see RAILROADS, 3, 4.

**BRIEFS:**

- On appeal, see APPEAL AND ERROR, 9.

**BROKERS:**

1. **BROKERS—CONTRACT—TERMINATION—SALE BY OWNER.** Where a broker's contract does not give him the exclusive right to sell the property, the owner is not liable for the commissions if he procures a sale himself without the agency of the broker; and it is immaterial that the broker's contract fixed a time limit within which the broker might make a sale. *Hammond v. Mau*..... 204

**BUILDINGS:**

- Liens for work and material, see MECHANICS' LIENS.
- Bonds guaranteeing building contracts, see PRINCIPAL AND SURETY.

**BURDEN OF PROOF:**

- As to holder in due course, see BILLS AND NOTES, 3.
- To show breach of warranty in policy, see INSURANCE, 9.
- To show want of authority in council to make reassessment, see MUNICIPAL CORPORATIONS, 38.

**CANCELLATION OF INSTRUMENTS:**

- Commencement of action to cancel tax deed, see LIMITATION OF ACTIONS, 1.
- Rescission of contract, see SALES, 6; VENDOR AND PURCHASER, 1-3.
- Setting aside tax sale, see TAXATION, 6.

**CHATTEL MORTGAGES—CONTINUED.**

direct to the purchaser that they would pay his draft for the shortage, whereupon he drew a sight draft therefor and took possession of the sheep; since he acted upon the authority given, and acceptance of the proposition obligated him to pay the mortgage debt. *Bicknell v. Henry*..... 408

2. **CHATTEL MORTGAGES—DEFAULT—FORECLOSURE — DECLARING WHOLE DEBT DUE.** A provision in a chattel mortgage that the mortgagees could take possession upon default in any payment, and immediately proceed to sell in the manner provided by law and pay the amounts provided in the notes, authorizes a foreclosure for the whole amount due when any part becomes due; and seizure on notice of sale is a sufficient declaration of intent to declare the whole debt due. *Woodward v. Lutsch*..... 59

3. **SAME—DEFENSES—TENDER—SUFFICIENCY.** After seizure of mortgaged chattels and commencement of foreclosure, a tender must include accrued costs, including a reasonable attorney's fee stipulated for in the mortgage. *Woodward v. Lutsch*..... 59

**CHILD:**

Things attractive to children, see **NEGLIGENCE**, 2, 3.

**CITIES:**

See **MUNICIPAL CORPORATIONS**.

**CITIZENS:**

Privileges and immunities, see **CONSTITUTIONAL LAW**, 2.

**CIVIL RIGHTS:**

See **CONSTITUTIONAL LAW**, 1.

False oath as to loss of by conviction of crime, see **ELECTIONS**, 5-7.

**CIVIL SERVICE:**

See **MUNICIPAL CORPORATIONS**, 7, 9.

**CLAIMS:**

Homestead exemption, see **HOMESTEAD**, 2.

Against city, presenting, see **MUNICIPAL CORPORATIONS**, 42.

**CLASS LEGISLATION:**

See **CONSTITUTIONAL LAW**, 2.

**CLOUD ON TITLE:**

See **QUIETING TITLE**.

**COLLATERAL ATTACK:**

- On judgment of divorce, see **DIVORCE**, 1, 2.
- On judgment, see **JUDGMENT**, 2.
- On order of school superintendent, see **MANDAMUS**.
- On tax foreclosure sale of mining claims, see **TAXATION**, 3-6.

**COLLISION:**

- Between vehicles on highway, see **HIGHWAYS**, 3.

**COLOR OF TITLE:**

- To sustain adverse possession, see **ADVERSE POSSESSION**, 1.

**COMMENT:**

- On facts by court, see **CRIMINAL LAW**, 6.

**COMMERCE:**

- Carriage of goods and passengers, see **CARRIERS**.

**COMMISSIONS:**

- Of broker, see **BROKERS**.

**COMMON CARRIERS:**

- See **CARRIERS**.

**COMMUNITY PROPERTY:**

- See **HUSBAND AND WIFE**, 1.
- Division of after divorce, see **DIVORCE**, 5, 6.
- Oral agreement for conveyance of, see **FRAUDS, STATUTE OF**, 4.
- Devise of, see **WILLS**, 2.

**COMPENSATION:**

- Of broker, see **BROKERS**.
- For property taken or damaged for public use, see **EMINENT DOMAIN**, 6-8, 10, 11, 13.
- Of city officer, liability for in *quo warranto*, see **MUNICIPAL CORPORATIONS**, 8.

**COMPLAINT:**

- In criminal prosecutions, see **INDICTMENT AND INFORMATION**.
- In civil actions, see **PLEADING**, 1, 2.

**CONCLUSION:**

- In pleading, see **PLEADING**, 1.

**CONCLUSIVENESS:**

- Of foreign decree on collateral attack, see **DIVORCE**, 2.
- Of determination as to necessity for condemnation, see **EMINENT DOMAIN**, 12.

**CHATTEL MORTGAGES—CONTINUED.**

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- For property taken or damaged for public use, see **EMINENT DOMAIN**, 6-8, 10, 11, 13.
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- Of foreign decree on collateral attack, see **DIVORCE**, 2.
- Of determination as to necessity for condemnation, see **EMINENT DOMAIN**, 12.

**CONCLUSIVENESS—CONTINUED.**

Of judgment, see JUDGMENT, 2-7.

Determination of council at hearing on assessment roll, see MUNICIPAL CORPORATIONS, 29.

Decisions of land department, see PUBLIC LANDS.

**CONCURRENT NEGLIGENCE:**

See NEGLIGENCE, 5.

**CONDEMNATION:**

Taking or damaging property for public use, see EMINENT DOMAIN.

**CONDITIONAL SALES:**

See SALES, 4-8.

**CONDITIONS:**

Precedent to action by corporation, see CORPORATIONS, 4.

Precedent to action against receiver, see RECEIVERS.

Precedent to action to set aside tax sale, see TAXATION, 6.

**CONDUCT:**

Misconduct of judge at trial, see CRIMINAL LAW, 6.

**CONFIRMATION:**

Of reassessment, see MUNICIPAL CORPORATIONS, 38.

**CONFLICT OF LAWS:**

Extraterritorial force of foreign laws, see STATUTES, 4.

**CONSIDERATION:**

Of bill of exchange or promissory note, see BILLS AND NOTES, 1, 2.

Damages for partial failure of, see CANCELLATION OF INSTRUMENTS, 3.

Of deed, see DEEDS, 3.

For promise to pay debt, see FRAUDS, STATUTE OF, 1.

For renewal agreement in lease, see LANDLORD AND TENANT, 1.

**CONSOLIDATION:**

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

**CONSTITUTIONAL LAW:**

Law extending boundaries of cities as special law, see MUNICIPAL CORPORATIONS, 1.

Subjects and titles of statutes, see STATUTES, 1, 3.

1. CONSTITUTIONAL LAW—CIVIL RIGHTS—RELIGIOUS LIBERTY—FORTUNE TELLING. Rem. & Bal. Code, § 2688, prohibiting "fortune telling" for a compensation is valid, notwithstanding the principles of religion laid down by the "National Astrological Society" include the practice of casting and reading horoscopes; since harmful practices may be prohibited though religious beliefs and opinions may not be interfered with. *State v. Neitzel*..... 567

**CONSTITUTIONAL LAW—CONTINUED.**

2. **CONSTITUTIONAL LAW—CLASS LEGISLATION—FISH.** Laws 1911, p. 496, regulating the fishing for salmon and making a different closed season in different waters of the state is not unconstitutional as class legislation or arbitrary and unreasonable, as it affects equally and impartially all persons similarly situated. *State v. Tice*.. 408

**CONSTRUCTION:**

- Of contract, see **CONTRACTS**, 2, 3; **MORTGAGES**, 1.
- Of deed, see **DEEDS**, 1, 2.
- Of election laws, see **ELECTIONS**, 1-4, 6.
- Of statute providing compensation to owner, see **EMINENT DOMAIN**, 6.
- Of insurance policy, see **INSURANCE**, 2.
- Of statute limiting commencement of action to cancel tax deed, see **LIMITATION OF ACTIONS**, 1.
- Of charter provisions adopting civil service, see **MUNICIPAL CORPORATIONS**, 7.
- Of bridge by city, see **MUNICIPAL CORPORATIONS**, 11.
- Of law limiting assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 22.
- Of partnership agreement, see **PARTNERSHIP**, 1.
- Negligent construction of overhead highway bridge, see **RAILROADS**, 2, 3.

**CONSTRUCTIVE TRUSTS:**

- See **TRUSTS**, 2.

**CONTEMPT:**

1. **CONTEMPT—VIOLATION OF JUDGMENT—WATER RIGHTS.** Where a deed conveyed one-half of the waters awarded to a party by a decree, the grantee is guilty of contempt in violating the decree if he uses more than half of the quantity fixed by the decree. *State ex rel. Olding v. Stampfly*..... 368

**CONTINUANCE:**

- Review of discretion in denying, see **APPEAL AND ERROR**, 15.

1. **CONTINUANCE—ABSENCE OF PARTY—DISCRETION.** It is not an abuse of discretion to refuse a continuance, asked on account of the absence of the defendant, where it appears that the defendant in an action on promissory notes was absent in Alaska several months while the case was pending; that on June 24th the case was set for trial on September 26th, and later continued to October 5th and 9th; that defendant could have been reached by telegraph or mail and advised of the date of trial in time to attend, but he failed to keep his attorney posted as to his address or how to reach him. *Nye v. Marley* ..... 631

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1. **BAIL—FORFEITURE—VACATION OF JUDGMENT—DISCRETION.** Rem. & Bal. Code, § 2233, providing that, if, upon a stay of execution against sureties on a bail bond, the person bailed shall be produced in court before expiration of the stay, the court may vacate the judgment against the bail on such terms as may be just and equitable, imposes a judicial discretion on the trial court, and not one that can be exercised arbitrarily. *State v. Johnson*..... 612
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Taxation of banks and bank stock, see TAXATION, 1, 2.

**BAR:**

Of action by former adjudication, see JUDGMENT, 5-7.

Of action by limitation, see LIMITATION OF ACTIONS.

**CONTRACTS—CONTINUED.**

8. **CONTRACTS—CONSTRUCTION BY PARTIES—EVIDENCE—ADMISSIBILITY.**  
The acts of the parties, as tending to show their interpretation of a contract, are not admissible where the contract was dated January 5, and the alleged breach occurred February 8, following, the contract was not ambiguous, and no practical interpretation put upon it by one party had been acquiesced in by the other. *Amherst Investment Co. v. Meacham*..... 284

**CONTRIBUTORY NEGLIGENCE:**

- Of servant, see MASTER AND SERVANT, 9-14.
- Of person injured, see NEGLIGENCE, 7.
- Of person injured on or near railroad tracks, see RAILROADS, 7.

**CONVEYANCES:**

- See ASSIGNMENTS; DEEDS; MORTGAGES.
- Necessity for writing, see FRAUDS, STATUTE OF, 4.
- By person restored to sanity, see INSANE PERSONS, 1.
- Contracts to convey, see VENDOR AND PURCHASER.
- By will, see WILLS.

**CORPORATIONS:**

- See MUNICIPAL CORPORATIONS.
  - Note as settlement of liability for illegal issue of stock, see BILLS AND NOTES, 1, 2.
  - Effect of contract limitation in indemnity bond by foreign corporation, see LIMITATION OF ACTIONS, 3.
  - Water companies, service to consumers, see WATERS AND WATER COURSES, 9.
1. **CORPORATIONS—STOCK—ILLEGAL ISSUE—LIABILITY TO BONA FIDE PURCHASER.** A corporation being liable to an innocent purchaser of an illegal issue of stock, the transfer of such stock to the corporation by a *bona fide* purchaser, in consideration of reimbursement of the purchase price paid, in the shape of a promissory note of the company, amounts to a surrender of the stock, in settlement of the company's liability. *Hobson v. Marsh*..... 326
  2. **CORPORATIONS—SALE OF STOCK—RESCISSION—FRAUD.** The purchaser of mining stock is entitled to rescind where it was represented that the same was treasury stock and that the money paid was to be used in development, when in fact it was the personal stock of the seller. *Gray v. Reeves*..... 374
  3. **CORPORATIONS—SALE OF STOCK—RESCISSION BY PURCHASER—FRAUD—EXPRESSION OF OPINION—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to warrant a rescission of the sale of stock for fraudulent representations respecting its value, notwithstanding expressions of the seller's opinion that the stock was worth what it had

## CORPORATIONS—CONTINUED.

brought at recent sales, and statements from the books showing overvaluation of goods on hand, where it appears that the parties were dealing on equal footing, that before the deal was closed, the purchaser, with ample opportunity and actual knowledge, made his own investigation, disregarded advice of the officers, attended several meetings of the stockholders held in an endeavor to raise a large working capital, upon which every one understood the fate of the enterprise depended. *Shores v. Hutchinson*..... 329

4. CORPORATIONS — ACTIONS — CONDITION PRECEDENT — PLEADING. A complaint by a corporation need not allege that the action was authorized by its board of directors, since it will be presumed until the contrary appears. *Goodale Phonograph Co. v. Valentine*.... 263

5. CORPORATIONS—RECEIVERS—VACATION—GROUNDS—PLEADING — COMPLAINT. A complaint by a corporation to vacate a receivership and set aside sales made by the receiver states a cause of action, where it appears that the assets of the corporation were of the value of \$5,000,000, its indebtedness inconsequential, that the defendants owned \$1,500,000 of the capital stock, on which they had paid only \$1,800, and were solvent, and that they prosecuted a collusive suit for the appointment of a receiver and secured a sale of all the assets for \$500, all the proceedings being *ex parte* and while the president and secretary of the company were absent from the state on the business of the company. *Goodale Phonograph Co. v. Valentine* ..... 263

## CORRECTION:

Of pleadings, see PLEADING, 2.

## CORROBORATION:

Of female in prosecution for rape, see RAPE, 2, 3.

## COSTS:

Review of objections to cost bill, see APPEAL AND ERROR, 21.

## COUNCIL:

Discretion to determine necessity and character of public improvement, see MUNICIPAL CORPORATIONS, 10.

## COUNTIES:

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- Condemnation proceedings, see EMINENT DOMAIN.
- Appointment of administrator, see EXECUTORS AND ADMINISTRATORS.
- Jurisdiction upon inquiry as to sanity of ward, see INSANE PERSONS, 2.
- Province of court and jury, see TRIAL, 1.

**COVENANTS:**

- Liability of agent for breach of on misrepresenting title, see PRINCIPAL AND AGENT.

**CREDITORS:**

- Conveyances in fraud of, see ATTACHMENT.
- Right to administer estate, see EXECUTORS AND ADMINISTRATORS.

**CRIMINAL LAW:**

- See CONTEMPT; FORGERY; PERJURY; RAPE; RECEIVING STOLEN GOODS; ROBBERY; VAGRANCY.
- Vacation of judgment on bail bond, see BAIL.
- Election offenses, see ELECTIONS, 4-7.
- Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
- Violation of liquor laws, see INTOXICATING LIQUORS, 1.
- Slander in charging crime, see LIBEL AND SLANDER, 2-4.
- Violation of school law for compulsory attendance, see SCHOOLS AND SCHOOL DISTRICTS, 4, 5.
- Foreign laws, conflict, see STATUTES, 4.

1. CRIMINAL LAW—VENUE—EVIDENCE—JUDICIAL NOTICE. The venue of an offense is sufficiently established in Whatcom county, where laid, by proof that it was committed in the city of Bellingham, as the courts will take judicial notice that Bellingham is in Whatcom county. *State v. Kincaid*..... 273
2. CRIMINAL LAW—FORMER JEOPARDY—SEPARATE TRIAL. Where a plea of not guilty and of former jeopardy are entered before the commencement of the trial, it is discretionary to direct that they be tried together. *State v. Elliott*..... 62
3. SAME—IDENTITY OF OFFENSES. A conviction for obtaining money under false pretenses, the gist of the offense resting primarily in securing credit for a false name, cannot be pleaded in bar of a prosecution for the forgery of an insurance policy, which was incidental to the other offense and arose out of the same transaction; since the crimes are separate and distinct, the false name being the essence of the first, and the uttering of spurious security, of the second. *State v. Elliott*..... 62
4. CRIMINAL LAW—EVIDENCE—RES GESTAE—SEVERAL DEFENDANTS—ACTS OF ONE. Where one of two robbers was immediately captured and given to the prosecuting witness to hold while the officer pur-

## CRIMINAL LAW—CONTINUED.

- sued the other, whereupon the first offered money to be allowed to escape and finally escaped, what was said and done while the other was absent is admissible as part of the *res gestae*, and also for the reason that there was concert of action between the two in the commission of the offense. *State v. Baker*..... 589
5. CRIMINAL LAW—EVIDENCE—ILLUSTRATIONS. It is not error to allow a witness who had been robbed to illustrate upon the person of another the position of the defendant's arms with relation to his person when his pocketbook was taken. *State v. Baker*..... 589
6. CRIMINAL LAW—TRIAL—COMMENT ON FACTS. In a prosecution for incest, in which the female, testifying for the defendant, contradicted an affidavit previously made by her, it is unlawful comment on the facts in violation of Const., art. 4, § 16, for the court, in the presence of the jury, to order the witness into the custody of the sheriff and to direct the filing of an information against her for perjury. *State v. Primmer*..... 400
7. CRIMINAL LAW—INSANITY AFTER CONVICTION—DETERMINATION—JURISDICTION—SUSPENSION OF JUDGMENT. Where a person convicted of crime has since become insane, the superior court has original jurisdiction, notwithstanding an appeal to the supreme court, to determine the question of his sanity and if insane to suspend the judgment; hence the supreme court will not entertain a motion to suspend judgment until the question of insanity is determined. *State v. Wilson*..... 235
8. CRIMINAL LAW—DEFENSE—INSANITY—PLEA—WAIVER—SUSPENSION OF JUDGMENT. Under Rem. & Bal. Code, § 2174 *et seq.*, providing for a special plea of insanity and the method of trial, when an accused person is mentally irresponsible at the time of trial, the plea is waived if not interposed before jury trial, and hence cannot be urged in the supreme court as ground for suspending judgment. *State v. Wilson*..... 235
9. CRIMINAL LAW—APPEAL—RECORD—INSTRUCTIONS. Upon appeal in a criminal case, an admittedly erroneous instruction cannot be disregarded as an inadvertence, or as incorrectly reported, as the record is conclusive. *State v. Rubenstein*..... 38
10. CRIMINAL LAW—APPEAL—HARMLESS ERROR. It is error without prejudice for the court, in a prosecution for attempt to rob, to inadvertently instruct the jury that the crime of attempted robbery includes the lesser offense of grand larceny, where no finding was made thereon and the error did not enter into the verdict. *State v. Baker* ..... 589

## CROSS-COMPLAINT:

See PLEADING, 2.



**DAMAGES:**

See **MALICIOUS PROSECUTION**, 5.

For negligence of abstracter, see **ABSTRACTS OF TITLE**.

For removal of lateral support, see **ADJOINING LANDOWNERS**.

In action to cancel deed for fraud, see **CANCELLATION OF INSTRUMENTS**, 3.

Compensation for property taken or damaged for public use, see **EMINENT DOMAIN**, 6-8, 10, 11, 13.

Injuries caused by public improvements, see **MUNICIPAL CORPORATIONS**, 18, 28, 31, 34, 36, 37.

Breach of contract for sale of goods, see **SALES**, 3-8.

Advisory verdict as to in equitable action, see **TRIAL**, 3.

Liability of warehouseman for breach of contract, see **WAREHOUSEMEN**.

1. **DAMAGES—LIQUIDATED DAMAGES—REASONABLENESS—LANDLORD AND TENANT.** Liquidated damages in the sum of \$1,200, for the lessees' breach of a lease is not unreasonable where the total rent for the five-year term amounted to \$36,000. *Barrett v. Monro*..... 229
2. **DAMAGES—LIQUIDATED DAMAGES OR PENALTY.** A contract whereby the vendor of capital stock of a corporation agreed to surrender up three notes for \$3,000 for cancellation, as liquidated damages in case of his failure to effect a settlement of claims aggregating only \$1,800, is an agreement for a forfeiture or a penalty, and only the actual damages sustained by its breach can be recovered; since a larger sum agreed to be paid as security for a less sum cannot be considered as liquidated damages, even if so designated in the contract. *Stoner v. Shultz*..... 687
3. **DAMAGES—INTEREST—FRAUD.** Interest is recoverable as a measure of damages where money is wrongfully obtained by fraudulent representations on the sale of stock which was of no value to the purchaser. *Gray v. Reeves*..... 374
4. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** It is not a clear abuse of discretion to set aside a verdict for personal injuries for \$5,215.50, as excessive and grant a new trial, unless the plaintiff consents to a remission of \$2,000, where it appears that the plaintiff, a boy, seventeen years of age, was injured in a runaway, the end of his collar bone was detached from the breast bone, and eight months later had not united, and the boy was 31 days in the hospital and testified that he was not able to work; the burden being upon the trial court to exercise its discretion. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12
5. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$4,000 for injuries to a coal miner 31 years of age, earning \$100 a month, is not excessive, where his leg was broken in two places, resulting in a thickening of the thigh bone, bending of the leg, and

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a loss of motion of 90 degrees of the knee joint, and the injury was permanent and incapacitated him from following his employment. *Aho v. Coast Coal Co.*..... 43

6. **DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT.** A verdict for \$6,000 for injuries sustained by a derrickman thirty-two years of age, earning \$3.50 per day is not excessive, where his arm was broken in several places, and its use permanently impaired, his shoulder was dislocated, he was in the hospital thirteen weeks, and had to undergo four operations, incurring an expense of \$650 and losing \$1,000 in wages up to the time of the trial. *Ulrickson v. Soderberg* ..... 347
7. **DAMAGES—EXCESSIVENESS—PERSONAL INJURIES.** A judgment for \$800 for injuries sustained by a school boy is not excessive, where he was severely bruised and suffered considerably temporarily and was unable to pass his grade at the end of the school year. *Haynes v. Seattle* ..... 419
8. **DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES.** A verdict for \$2,000 for personal injuries sustained by a farmer fifty-six years of age in good health, will not be set aside as excessive, where he received internal injuries, confining him to the house for three months, and incapacitating him from work up to the time of the trial, ten months after receiving the injuries. *Grimes v. Cathcart* ..... 519
9. **DAMAGES—EXCESSIVE VERDICT—PERSONAL INJURIES.** A verdict for \$1,000 for injuries sustained by a hook tender, earning \$3.50 a day, will not be set aside as excessive, where he was severely bruised and injured about the head and neck, and there was evidence that his neck was stiff and sore, that he was physically unfit for his former employment, and that it would probably be a year or more before he recovered. *Hill v. Pacific States Lumber Co.*..... 565

**DEATH:**

Of party to action ground for abatement, see **ABATEMENT AND REVIVAL**.  
Of employee, see **MASTER AND SERVANT**, 1.

**DEBT:**

Sale by mortgagee to preserve security as an election to declare whole debt due, see **BILLS AND NOTES**, 6.  
Right to declare whole debt due upon default by mortgagor, see **CHATTEL MORTGAGES**, 2.  
Promise to pay debt of another, see **FRAUDS, STATUTE OF**, 1, 2.  
Community debt, see **GAMING**.  
Mistake in payment of, see **PAYMENT**.

**DECEDENTS:**

Estates, see **EXECUTORS AND ADMINISTRATORS**.

**DECISION:**

- Decisions reviewable, see **APPEAL AND ERROR**, 1, 2.
- On appeal, see **APPEAL AND ERROR**, 25.
- Of land department, conclusiveness, see **PUBLIC LANDS**.

**DECLARATIONS:**

- Of homestead, see **HOMESTEAD**, 1.

**DEDUCTION:**

- Of real estate from assessed value of capital stock, see **TAXATION**, 1, 2.

**DEEDS:**

- Acknowledgment of execution, see **ACKNOWLEDGMENT**.
- Void deed as color of title, see **ADVERSE POSSESSION**, 1.
- Cancellation, see **CANCELLATION OF INSTRUMENTS**.
- Commencement of action to cancel tax deed, see **LIMITATION OF ACTIONS**, 1.
- Tax deeds, see **TAXATION**, 5.

1. **DEEDS—DESCRIPTION—BOUNDARIES—RESERVATIONS — INTENT — CONSTRUCTION BY PARTIES.** A deed of land by metes and bounds including calls "to the harbor limit" and "parallel to said harbor line," which reserves a strip of land thirty feet wide off the northeast corner for a distance of 148.3 feet for the purpose of a public road, must be taken to convey to the inner shore or high water line, and not to the meander line, which was about 100 feet distant where the water was from four to eight feet deep at high water, especially where the strip at high water mark had been used as a roadway for several years prior to the execution of the deed, and was thereafter used by the public continuously as a road for more than ten years prior to the commencement of the action. *Brown v. Bremerton* ..... 474
2. **DEEDS—CONSTRUCTION — INTENT — EXTRINSIC EVIDENCE.** The fact that a common grantor in his last deed reserved a strip of land thirty feet wide along the meander line for a public road, does not show that a like reservation in a deed of a contiguous tract made six years previously of thirty feet "along the shore line" was intended to mean along the meander line. *Brown v. Bremerton*... 474
3. **DEEDS—CONSIDERATION—EVIDENCE.** Evidence examined and held to establish that part of the consideration for deeds was the assumption of specified debts of the grantor. *Hewett v. Dole*.... 163

**DEFAULT:**

- Right of mortgagee to declare whole debt due upon default by mortgagor, see **CHATTEL MORTGAGES**, 2.
- In payment of interest, see **MORTGAGES**, 1.

**DEFECT:**

Notice of in title to note, see **BILLS AND NOTES**, 4.

**DEGREES:**

Conviction of lesser offense, see **INDICTMENT AND INFORMATION**, 2.

**DELAY:**

In bringing action, see **LIMITATION OF ACTIONS**, 2.

In performance of contract, see **SALES**, 1, 2.

**DELIVERY:**

Of goods sold, see **SALES**, 1, 2.

By warehouseman, see **WAREHOUSEMEN**.

**DEMURRAGE:**

Liability for on failure to complete building on time, see **PRINCIPAL AND SURETY**, 3.

**DENIALS:**

In pleading, see **PLEADING**, 3.

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Pleading in action on accident policy, see **INSURANCE**, 8.

**DESCENT AND DISTRIBUTION:**

Liquor license as property passing on death of holder, see **INTOXICATING LIQUORS**, 2.

**DESCRIPTION:**

Of property conveyed, see **DEEDS**, 1.

Of property in notice of foreclosure sale, see **TAXATION**, 3.

**DEVISES:**

See **WILLS**.

**DILIGENCE:**

Lack of in rescinding contract for fraud, see **VENDOR AND PURCHASER**, 3.

**DIRECTING VERDICT:**

In civil actions, see **TRIAL**, 1.

**DISCHARGE:**

Of guardian, see **INSANE PERSONS**.

**DISCRETION OF COURT:**

Review of, see **APPEAL AND ERROR**, 14, 15.

Vacation of judgment forfeiting bail bond, see **BAIL**.

Refusal of continuance, see **CONTINUANCE**, 1.

**DISMISSAL AND NONSUIT:**

At trial, see TRIAL, 1.

**DISSOLUTION:**

Of attachment, see ATTACHMENT.

Of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 2.

**DISTRICTS:**

Assessment districts, see MUNICIPAL CORPORATIONS, 17, 20, 23, 26.

School districts, consolidation, see SCHOOLS AND SCHOOL DISTRICTS, 1, 2.

**DIVERSION:**

Of water course, see WATERS AND WATER COURSES, 8.

**DIVISION OF PROPERTY:**

Wife's right of action for, see DIVORCE, 5, 6.

**DIVORCE:**

1. **DIVORCE—DECREE—COLLATERAL ATTACK.** An action for a divorce and the division of community property, seeking also the annulment of a foreign divorce fraudulently obtained by the defendant, constitutes a collateral attack on such decree, the annulment of which is a mere incident to the primary purpose of the action. *Hicks v. Hicks* ..... 627
2. **SAME—SERVICE OF SUMMONS—FRAUD.** A foreign decree of divorce, valid on its face, by a court of general jurisdiction, adjudicating a valid service of summons, is conclusive on collateral attack and cannot be impeached for fraud. *Hicks v. Hicks*..... 627
3. **DIVORCE—SUIT MONEY—ALIMONY PENDING APPEAL—SHOWING—SUFFICIENCY.** Where the action of a wife for a divorce was dismissed after a full hearing and appears to be without merit, and both parties are possessed of considerable property, and there is no community property, the supreme court will not grant suit money and temporary alimony pending the appeal; since the equities must be so strong or the interests in the property so mutual as to make it a matter of right rather than of privilege. *Gust v. Gust*..... 220
4. **DIVORCE — DECREE — DISPOSITION OF REAL PROPERTY — VENUE OF ACTION.** In a divorce action, commenced in the county where the plaintiff resides, under Rem. & Bal. Code, § 984, the court has jurisdiction to dispose of real property situated in another county, where it is described in the complaint, under Id., § 989, authorizing the court to dispose of any property of the parties; and Id., § 204, providing that actions to recover real estate shall be brought in the county where the subject is situated, does not apply. *Catton v. Catton* ..... 130
5. **DIVORCE—COMMUNITY PROPERTY — DIVISION — SUBSEQUENT ACTION.** Where a divorce obtained by a husband made no mention of com-

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munity property, the title thereto vests in the parties as tenants in common; and the wife has a right of action for a division or in lieu thereof some provision for maintenance. *Hicks v. Hicks*.. 627

6. **SAME—SUBSEQUENT ACTION—LIMITATIONS—TENANTS IN COMMON.**

A decree of divorce making no mention of community property is not an assertion of an adverse claim thereto; and as the husband holds possession as a tenant in common, limitations do not run against the wife's right of action for a division. *Hicks v. Hicks* 627

7. **DIVORCE—APPEAL—EFFECT — STAY — GARNISHMENT AFTER APPEAL.**

Upon appeal from a judgment of divorce, disposing of the property rights of the parties, the superior court loses all jurisdiction and cannot issue a writ of garnishment to enforce the judgment for costs and attorney's fees against the husband, although he failed to file any supersedeas bond on his appeal; in view of Rem. & Bal. Code, § 996, providing that on appeal in a divorce case, the supreme court shall be possessed of the whole case as fully as the superior court was. *State ex rel. Gibson v. Superior Court*..... 280

**DRAINS:**

Flooding by obstruction of surface water, see **MUNICIPAL CORPORATIONS**, 39.

**DURESS:**

In securing deed, see **CANCELLATION OF INSTRUMENTS**, 1.

**EARNINGS:**

Of wife as separate property, see **HUSBAND AND WIFE**, 2, 3.

**ELECTION:**

To declare debt due, see **BILLS AND NOTES**, 6.

To rescind contracts for land, see **VENDOR AND PURCHASER**, 2.

Between testamentary provisions and other rights, see **WILLS**, 24.

**ELECTIONS:**

Moot questions, review of, see **APPEAL AND ERROR**, 11.

Submission of issuance of municipal bonds to popular vote, see **MUNICIPAL CORPORATIONS**, 41.

Voting at school election, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

1. **ELECTIONS—PRIMARY ELECTIONS—STATUTES—CONSTRUCTION.** The primary election law, Rem. & Bal. Code, § 4837, only adopts provisions of the statutes with relation to the holding of elections, and not general criminal statutes which are no part of the election laws. *State v. Robinson*..... 172

2. **ELECTIONS—MUNICIPAL PRIMARY ELECTIONS—FEES.** Under Rem. & Bal. Code, § 4805, which provides that the state primary election law shall not apply to nomination of candidates for municipal elective

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offices in cities of the first class which have adopted a nonpartisan method of nominating candidates, the city clerk in such cities cannot collect the filing fee required by Id., § 4808 of the state law, the city charter making no provision for the payment of such a fee. *State ex rel. Holtzner v. Bothwell*..... 217

3. ELECTIONS—ELECTION PRECINCTS — ESTABLISHMENT—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7678, in the act entitled an act providing for the organization and government of municipal corporations, which provides that all elections in cities of the third class shall be held in accordance with the general election laws of the state so far as applicable, that the city council shall give notice of such election, etc., and establish election precincts, has reference only to municipal elections, and therefore does not conflict with Rem. & Bal. Code, § 4798, which provides that the county commissioners shall divide the county, including all cities except cities of the first class, into election precincts, based on the number of votes cast at the last general election. *Hillyard v. Board of County Com'rs* ..... 423

4. ELECTIONS—PRIMARY ELECTIONS—ELECTION OFFICERS—OFFENSES. Rem. & Bal. Code, § 4967, which provides that every person charged with the performance of any duty under the provision of any law of the state relating to elections who wilfully neglects to perform such duty shall be punished by fine or imprisonment, being an early general criminal statute not a part of any election act, is general in its application, and applies to the September primary election for the nomination of candidates, under the act of 1909, subsequently enacted; hence such officers may be prosecuted for malfeasance under § 4967. *State v. Robinson*..... 172

5. ELECTIONS—OFFENSES—FRAUDULENT REGISTRATION—FALSE OATH—LOSS OF "CIVIL RIGHTS." The registration oath, required by Rem. & Bal. Code, § 4768, that the elector had not lost his civil rights by having been convicted of an infamous crime, is not shown to be false by an allegation in an information for false swearing that the accused had taken the oath after conviction of a felony, where, by such conviction, he had lost no civil rights, but only the right to vote, which is a political and not a civil right. *State v. Collins* ..... 268

6. SAME—STATUTES CONSTRUED. Const., art. 6, § 3, providing that persons convicted of infamous crimes shall be excluded from the elective franchise unless restored to their civil rights, cannot be taken as a construction of the existing territorial statute (Rem. & Bal. Code, § 4755), to mean that such persons lost their civil rights, when the act only forfeited their right to vote, a political and not a civil right. *State v. Collins*..... 268

## ELECTIONS—CONTINUED.

7. SAME—INFAMOUS CHARGE—JAIL BREAKING. An information for falsely swearing in a registration oath made pursuant to Rem. & Bal. Code, § 4768, that the accused had not lost his civil rights by being convicted of an infamous crime, is insufficient where it merely alleges that the accused had been convicted of the infamous crime of jail breaking in another state without showing that at the time of his escape he was held on an infamous charge; since by Rem. & Bal. Code, § 2342, jail breaking is a felony only where the prisoner was held on a felony charge, and a misdemeanor if held otherwise. *State v. Collins*..... 268

## EMINENT DOMAIN:

Appearance by railroad attorney for city in condemnation proceeding, see ATTORNEY AND CLIENT.

1. EMINENT DOMAIN—PUBLIC USE—CHANGE OF STREET GRADE—ACCOMMODATION OF RAILROAD COMPANY. Under Rem. & Bal. Code, § 7507, providing that a city may authorize or prohibit the maintenance of a railroad in streets and prescribe the conditions thereof, the granting of a franchise to a public service railway corporation to cross a street at a specified height, and changes of street grades in the vicinity to meet the necessities of the railroad grade, are for a public use, notwithstanding that the railroad company agreed to pay all condemnation awards against the city. *Spokane v. Thompson* ..... 650
2. SAME—PUBLIC NECESSITY—USE BY RAILROAD. The widening of a street to be given over in part to a railway company is a public use, and will not be reviewed by the courts in the absence of positive fraud. *Tacoma v. Brown*..... 538
3. SAME—PUBLIC USE—SCHOOL PLAY GROUNDS. The condemnation of land adjacent to a school house site, which the physical development of the school children required as a suitable place for recreation and exercise, is for a public use and within the provision of the public schools. *State ex rel. School District No. 56 v. Superior Court* ..... 189
4. EMINENT DOMAIN—RAILROADS—POWER TO CONDEMN—PUBLIC SERVICE—EXTENT—GOOD FAITH. A railway terminal company organized primarily to connect business enterprises of a city with terminals of a railroad company in another city, by means of tracks and car ferries operated by the company and reaching various cities, and to carry freight in car load lots between such points, is a railroad company entitled to condemn land, where it has shown its good faith by the expenditure of money for the acquisition of like terminals in another city. *State ex rel. Bremer v. Superior Court*... 278
5. EMINENT DOMAIN—PURPOSES—PLEADING AND PROOF—RAILROAD RIGHT OF WAY. In eminent domain proceedings to condemn a



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right of way necessary for a new railway line, and also necessary for the petitioner's use in the construction, maintenance, and operation of another old line which is coincident with the new line at a certain point, land may be condemned for the purpose of a necessary slope on moving the old line to the west in order to make a fill for the new line, forty feet above the old line. *State ex rel. Flint v. Superior Court*..... 300

6. EMINENT DOMAIN—COMPENSATION —STATUTES — CONSTRUCTION—SCHOOL HOUSE SITES. Rem. & Bal. Code, § 913, providing that, upon the condemnation of a school site, the compensation to be paid the owner shall be the fair and full value of the premises does not limit the recovery to the naked value of the land, in violation of the constitution requiring payment of the value of the land taken and for any depreciation to the land not taken; since the statute is directory and contains no words of limitation confining the jury to the value of the land taken alone. *State ex rel. School District No. 56 v. Superior Court*..... 189
7. SAME—DAMAGES—OBSTRUCTION OF ALLEY. The closing of a 16-foot alley by the change of grade of a street is a special damage to the property abutting on the alley. *Spokane v. Thompson*..... 650
8. SAME—DAMAGES—RULE OF ASSESSMENT—OFFSET OF BENEFITS. In condemnations for street grade changes to meet grades of a railroad company, the railroad agreeing to pay all condemnation awards against the city, being for the public benefit and not solely in the interest of the company, and being prosecuted in the name of the city, the damages are to be assessed under Rem. & Bal. Code, § 7782, and Const., art. 1, § 16, permitting cities to offset special benefits against the damage, and not under Id., § 926, authorizing damages against a railroad company irrespective of any benefit to the property. *Spokane v. Thompson*..... 650
9. SAME — PROCEEDINGS —PARTIES PLAINTIFF. Condemnations for street grade changes to meet grades of a railroad company, which agreed to pay all condemnation awards against the city, are properly prosecuted in the name of the city. *Spokane v. Thompson*..... 650
10. SAME—DAMAGES—EVIDENCE. In condemnation proceedings to assess the damages from the elevation of F. street, evidence as to damages from the obstruction of an alley by a change of D. street is not admissible, not being an issue. *Spokane v. Thompson*.... 650
11. SAME. In condemnation proceedings to assess the damages to an abutting lot by reason of a change of street grade elevating the street through the entire block, it is error to confine the evidence of damage to that part of the street immediately in front of the lot. *Spokane v. Thompson*..... 650

**EMINENT DOMAIN—CONTINUED.**

12. **EMINENT DOMAIN—STREETS—PUBLIC NECESSITY—DETERMINATION BY CITY COUNCIL—REVIEW.** The determination by the city council of the necessity for extending or widening streets being conclusive on the courts, no prejudice results from an *ex parte* order of court declaring the necessity, or from an order striking answers setting up a lack of public necessity, the city council having determined the question. *Tacoma v. Brown*..... 538
13. **SAME—DAMAGES—VERDICT—REVIEW.** The supreme court will not substitute its judgment for that of the jury as to the damages awarded in condemnation, especially where the jury viewed the property. *Tacoma v. Brown*..... 538

**EMPLOYEES:**

See MASTER AND SERVANT.

**ENTRY:**

Of judgment on bail bond, see BAIL.  
Of public lands, see PUBLIC LANDS.

**EQUITY:**

See CANCELLATION OF INSTRUMENTS; QUIETING TITLE; TRUSTS.  
Actions to redeem, see MORTGAGES, 2.  
Submission of issue of damages to jury, see TRIAL, 3.  
Enjoining obstruction of waters, see WATERS AND WATER COURSES, 2-7.

1. **EQUITY—LACHES—STATUTE OF LIMITATIONS—MINING STOCK AND PROPERTY.** Laches will not prevent the recovery for fraud in the sale of mining stock, where there is no element of estoppel or any special circumstance rendering inequitable the prosecution of an action within the time fixed by the statute of limitations; mining stock not being within the rule that the doctrine of laches is peculiarly applicable to mining property, when the corporation and its property were not involved. *Gray v. Reeves*..... 374

**ESTABLISHMENT:**

Of election precincts, see ELECTIONS, 3.  
Of highways, see HIGHWAYS, 1.  
Of trusts, see TRUSTS.

**ESTATES:**

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

**ESTIMATES:**

Exceeding estimate of cost of improvement, see MUNICIPAL CORPORATIONS, 24.

**ESTOPPEL:**

- To claim nonacceptance of policy, see **INSURANCE**, 4.
- By laches to attack judgment, see **JUDGMENT**, 4.
- By judgment, see **JUDGMENT**, 5-7.
- To repudiate redemption agreement, see **MORTGAGES**, 2.
- To rescind sale of land, see **VENDOR AND PURCHASER**, 1.

**EVIDENCE:**

- See **CANCELLATION OF INSTRUMENTS**; **LIBEL AND SLANDER**, 4; **RECEIVING STOLEN GOODS**.
  - Impeaching denial as to acknowledgment of deed, see **ACKNOWLEDGMENT**.
  - Objections for purpose of review, see **APPEAL AND ERROR**, 3.
  - Review on appeal, see **APPEAL AND ERROR**, 17.
  - Harmless error in rulings on, see **APPEAL AND ERROR**, 22.
  - To support attachment on ground of fraudulent conveyance of property, see **ATTACHMENT**.
  - On note, see **BILLS AND NOTES**, 3-5.
  - For personal injuries, see **CARRIERS**, 2; **RAILROADS**, 3-7.
  - To show assumption of mortgage debt by purchaser of property, see **CHATTEL MORTGAGES**, 1.
  - To aid in construing contract, see **CONTRACTS**, 2, 3.
  - Of fraud in sale of corporate stock, see **CORPORATIONS**, 3.
  - In criminal prosecutions, see **CRIMINAL LAW**, 1, 4, 5; **ROBBERY**.
  - Construction of deed, see **DEEDS**, 2.
  - To show consideration for deeds, see **DEEDS**, 3.
  - Condemnation proceedings, see **EMINENT DOMAIN**, 10, 11.
  - Acceptance of insurance policy, see **INSURANCE**, 3.
  - Of former adjudication, see **JUDGMENT**, 5.
  - For injuries to servant in general, see **MASTER AND SERVANT**, 1, 2, 16.
  - Receipt of money after notice of fraud, see **MONEY RECEIVED**.
  - To sustain assessment, see **MUNICIPAL CORPORATIONS**, 25.
  - Negligent construction of sewer by city, see **MUNICIPAL CORPORATIONS**, 40.
  - Sufficiency to show negligence, see **NEGLIGENCE**, 4.
  - Ground for new trial in civil actions, see **NEW TRIAL**, 2.
  - To show partnership, see **PARTNERSHIP**, 2.
  - Malpractice of physician, see **PHYSICIANS AND SURGEONS**, 2.
  - In prosecution for rape, see **RAPE**.
  - Of regularity of tax foreclosure proceedings, see **TAXATION**, 5.
  - Establishment of trust, see **TRUSTS**, 2.
  - On construction of will, see **WILLS**, 3, 4.
  - Agreement to make gift of property for services, see **WORK AND LABOR**.
1. **EVIDENCE—PAROL TO VARY WRITING.** Where a contract employing an agent to take charge of specified property was plain and explicit

**EVIDENCE—CONTINUED.**

in defining the agent's duties, parol evidence that he in addition at the time agreed to pay certain rents for the employer is inadmissible as varying the terms of the writing. *Amherst Investment Co. v. Meacham*..... 284

2. **EVIDENCE—PAROL EVIDENCE TO VARY WRITTEN CONTRACT.** Evidence of verbal warranties alleged to have been made prior to the execution of a written contract of sale are inadmissible as contradicting the terms of the writing. *Eilers Music House v. Oriental Co.*... 618

**EXCAVATIONS:**

Removal of lateral support by, see **ADJOINING LANDOWNERS**.

**EXCEPTIONS:**

Necessity for purpose of review, see **APPEAL AND ERROR**, 4-6.  
To limitation of statute, see **LIMITATION OF ACTIONS**, 3.

**EXCESSIVE DAMAGES:**

See **DAMAGES**, 4-9.

**EXCUSE:**

For delay in bringing action, see **LIMITATION OF ACTIONS**, 2.

**EXECUTION:**

Stay of on forfeiture of bail bond, see **BAIL**.  
Signing contracts, see **CONTRACTS**, 1.  
Exemptions, see **HOMESTEAD**.  
Exemption of wife's earnings from, see **HUSBAND AND WIFE**, 1.

**EXECUTORS AND ADMINISTRATORS:**

Probate of nuncupative will, see **WILLS**, 1.

1. **EXECUTORS AND ADMINISTRATORS—RIGHT TO LETTERS—PREFERRED CLASSES—NOMINEES—RIGHT OF CREDITORS.** Rem. & Bal. Code, § 1389, providing that administration of the estate shall be granted in the following order: (1) to the surviving husband or wife; (2) to the next of kin in a specified order, and (3) to principal creditors, creditors have no more than a privilege to pray for letters if the others do not exercise their preference, and the court may appoint the nominee of one of the preferred classes although the statute does not expressly give the right of nomination; in view of the provision that creditors cannot exercise their right until after the lapse of 40 days, and the implication of power in the court to exercise its discretion, and the provision authorizing the appointment of any suitable person if the heirs in writing waive their right. *Larson v. Stewart* ..... 223

**EXEMPTIONS:**

See HOMESTEAD.

Of wife's earnings as community property, see HUSBAND AND WIFE, 1.

Assessment of exempt property, effect on reassessment, see MUNICIPAL CORPORATIONS, 33.

Property exempt from reassessment, see MUNICIPAL CORPORATIONS, 37.

**EXTENSION:**

Boundaries of cities adjacent to navigable waters, see MUNICIPAL CORPORATIONS, 1, 2.

**FALSE SWEARING:**

See PERJURY.

**FEES:**

Filing fees required by primary election laws, see ELECTIONS, 2.

**FILING:**

Declaration of homestead, see HOMESTEAD, 1.

Claims against city for damages, see MUNICIPAL CORPORATIONS, 42.

**FINAL JUDGMENT:**

Appealability, see APPEAL AND ERROR, 2.

**FINDINGS:**

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 4.

Review on appeal, see APPEAL AND ERROR, 19.

**FIRE INSURANCE:**

See INSURANCE, 3, 4.

**FISH:**

Law regulating fishing for salmon as class legislation, see CONSTITUTIONAL LAW, 2.

1. FISH—RIGHT TO FISH. There is no private right or privilege to take fish in waters of the state except as granted by the state. *State v. Tice* ..... 403

**FLOODING:**

Injury to property by obstruction of drain, see MUNICIPAL CORPORATIONS, 39.

Injury to lands from flooding, see WATERS AND WATER COURSES, 3, 4, 7, 8.

**FORECLOSURE:**

Of mortgage, see CHATTEL MORTGAGES; MORTGAGES, 1.

Of lien, see MECHANICS' LIENS.

**FOREIGN LAWS:**

See STATUTES, 4, 5.

**FORFEITURE:**

Of bail bond, see BAIL.

Of insurance, see INSURANCE, 5, 6.

**FORGERY:**

See CRIMINAL LAW, 3.

1. **FORGERY—INSTRUCTIONS.** An instruction that the mere uttering of a forged instrument is a circumstance tending to show knowledge of its falsity, is not prejudicially erroneous when immediately explained to mean that if the jury find that if it was forged and uttered by the defendant or his codefendant with his assistance, then the jury could consider these facts in determining whether the defendant knew it was forged at the time it was uttered. *State v. Elliott* ..... 62

**FORMER ADJUDICATION:**

See JUDGMENT, 5-7.

**FORMER JEOPARDY:**

Bar to prosecution, see CRIMINAL LAW, 2, 3.

**FORTUNE TELLING:**

See VAGRANCY.

Validity of law prohibiting practice, see CONSTITUTIONAL LAW, 1.

**FRANCHISES:**

Loss of elective franchise by conviction of crime, see ELECTIONS, 5-7.

Duty of water company under to defray cost of connections to property line, see WATERS AND WATER COURSES, 9.

**FRAUD:**

See INSURANCE, 5; MONEY RECEIVED.

Fraudulent disposition of property, see ATTACHMENT.

As ground for cancellation of deeds, see CANCELLATION OF INSTRUMENTS.

In sale of corporate stock, see CORPORATIONS, 2, 3.

Damages for fraud in sale of stock, see DAMAGES, 3.

Conclusiveness of foreign decree on collateral attack for fraud, see DIVORCE, 2.

False swearing in registration oath, see ELECTIONS, 5-7.

In sale of mining stock, see EQUITY.

As to rate of interest in note, see INTEREST.

Vacation of order procured by, see JUDGMENT, 1.

Of agent, see PRINCIPAL AND AGENT.

Sales of realty, see VENDOR AND PURCHASER, 3.

**FRAUD—CONTINUED.**

1. **FRAUD—FALSE REPRESENTATIONS—LIABILITY—INDUCEMENTS.** There is actionable fraud for which recovery may be had, where the defendant induced the plaintiff to purchase mining stock relying on the element of friendship, the defendant's experience as a mining man, the promise of a certain fortune, and the false representations that the stock was nonassessable and that the money paid would be used for the development of the property. *Gray v. Reeves*.. 374

**FRAUDS, STATUTE OF:**

1. **FRAUDS, STATUTE OF—DEBT OF ANOTHER—ORIGINAL UNDERTAKING—CONSIDERATION.** There is an original undertaking on sufficient consideration, and not a promise to answer for the debt of another, within the statute of frauds, where the principal creditor of a contractor was interested in seeing him complete a grading contract, the proceeds of which had been assigned to it, and upon a threatened foreclosure of a chattel mortgage upon the contractor's outfit, promised the mortgagee to pay any balance due, if the mortgagee would forego foreclosure until the contract was completed. *McKay v. Northern Bank & Trust Co.*..... 186
2. **FRAUDS, STATUTE OF—ORIGINAL PROMISE.** A promise by the purchaser of sheep to pay the balance due on a chattel mortgage, in consideration of the consent of the mortgagees to the transfer, is an original promise upon an independent consideration, and not to answer for the debt of another within the statute of frauds. *Bicknell v. Henry*..... 408
3. **FRAUDS, STATUTE OF—LEASE—AGREEMENT FOR RENEWAL—VALIDITY.** Under Rem. & Bal. Code, § 8745, requiring all conveyances of real estate to be by deed, and § 8746, requiring deeds to be acknowledged, and § 8802, providing that leases for any term not exceeding one year shall be valid without acknowledgment, an unacknowledged lease for one year with the privilege of renewal is void and unenforcible. *Anderson v. Frye & Bruhn*..... 89
4. **FRAUDS, STATUTE OF—CONVEYANCE OF COMMUNITY PROPERTY—ORAL AGREEMENT.** An oral agreement by a widow to allow her community interest in real estate to go under her husband's will cannot be shown to divest her of her community interest, the statute requiring such conveyance to be by deed. *Herrick v. Miller*..... 456

**FRAUDULENT CONVEYANCES:**

As ground for attachment, see ATTACHMENT.

**GAMING:**

1. **GAMING—CONTRACTS—MONEY LOANED—HUSBAND AND WIFE—COMMUNITY DEBT.** Money loaned to a husband for the express purpose of gambling in futures in a manner prohibited by law cannot be recovered either from the husband or the community, and is therefore not a community debt. *Catton v. Catton*..... 130

**GARNISHMENT:**

After appeal to enforce judgment for costs and attorneys' fees, see **DIVORCE**, 7.

**GIFTS:**

In consideration for service, see **WORK AND LABOR**.

**GOOD FAITH:**

Of sureties on bail bond in attempt to produce accused, see **BAIL**.  
Of purchaser, see **BILLS AND NOTES**, 3-5.

**GRANTS:**

By state of right to take fish, see **FISH**.

**GUARDIAN AND WARD:**

Guardianship of insane persons, see **INSANE PERSONS**.  
Presumption as to validity of order discharging guardian, see **JUDGMENT**, 1.

**HARMLESS ERROR:**

In civil actions, see **APPEAL AND ERROR**, 20-24.  
In criminal prosecution, see **CRIMINAL LAW**, 10.

**HIGHWAYS:**

Accidents at railroad crossings, see **RAILROADS**, 3-7.  
Public roads across land as incumbrances, see **VENDOR AND PURCHASER**, 1.

1. **HIGHWAYS—WHAT CONSTITUTES—PRESCRIPTION.** Roads across unimproved arid lands become public highways by user, where they were well defined and commonly traveled for more than thirty years, the county officers repaired and improved them within the last five years, and the public used them continuously as public highways for many years. *M'Whorter v. Forney Brothers & Co.* 414
2. **HIGHWAYS—NEGLIGENCE—LIABILITY—COMPLAINT—SUFFICIENCY.** A county is not required to maintain guard rails along a hillside county road, constructed fifteen feet wide and safe for ordinary travel, where there is no extraordinary condition or unusual hazard, and is therefore not liable for injuries caused by want of a railing, although it is alleged in the complaint that a frightened horse shied, lost his footing and fell eight or ten feet down a "steep incline and sheer decline and pitfall," there being no allegation that the bank was perpendicular or vertical. *Leber v. King County*..... 134
3. **HIGHWAYS—COLLISIONS BETWEEN VEHICLES—ACTIONS—QUESTIONS FOR JURY.** In an action for personal injuries, the negligence of the defendant in driving into plaintiff's vehicle is for the jury, where defendant made no effort to check his speed and needlessly called for the plaintiff to get out of his way. *Grimes v. Cathcart*..... 519



## HOMESTEAD:

Entry on public lands, see PUBLIC LANDS.

1. HOMESTEADS—EXEMPTIONS—EXECUTION—TIME FOR FILING DECLARATION. The lien of a judgment is superseded and rendered unenforcible where, prior to execution, the judgment debtor files a declaration of homestead. *Kenyon v. Erskine*..... 110
2. SAME—CLAIM OF EXEMPTION—WAIVER. Where a judgment creditor claims a lien superior to a homestead claim, and stands upon his contention without asking an appraisal, he cannot on appeal allege that the claim exceeded \$2,000 in value, and allege error in the court's failing to direct steps to subject the excess to sale. *Kenyon v. Erskine*..... 110

## HUSBAND AND WIFE:

See DIVORCE.

Wife's oral agreement to convey community interest in real property, see FRAUDS, STATUTE OF, 4.

Community debts, see GAMING.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—PERSONAL EARNINGS OF WIFE. Where the wife's personal earnings are community property, Rem. & Bal. Code, § 570, exempting them from attachment or execution upon any liability against the husband, does not exempt them from execution upon a judgment against the community. *Marsh v. Fisher*..... 570
2. SAME. A wife's personal earnings are her separate property only where she is living separate and apart from her husband, in the absence of any agreement between husband and wife with respect thereto. *Marsh v. Fisher*..... 570
3. SAME—AGREEMENT AS TO PERSONAL EARNINGS OF WIFE. An agreement between husband and wife that the earnings of each while living together shall be the separate property of each cannot affect existing creditors of the community. *Marsh v. Fisher*..... 570

## IDENTITY:

Of offenses as affecting former jeopardy, see CRIMINAL LAW, 3.

## IMPEACHMENT:

Of foreign decree for fraud, see DIVORCE, 2.

## IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS.

## INCEST:

See CRIMINAL LAW, 6.

## INCONSISTENT PLEADINGS:

See PLEADING, 2.

**INCUMBRANCES:**

Entitling vendee to rescind sale of land, see **VENDOR AND PURCHASER**, 1.

**INDEMNITY:**

See **PRINCIPAL AND SURETY**.

Contract limitation in bond, see **LIMITATION OF ACTIONS**, 2, 3.

Bond of contractors on public work, see **MUNICIPAL CORPORATIONS**, 3-6.

**INDIANS:**

Sale of liquor to, see **INTOXICATING LIQUORS**, 1.

**INDICTMENT AND INFORMATION:**

See **PERJURY**.

In prosecution for false swearing in registration oath, see **ELECTIONS**, 7.

Violation of school law for compulsory attendance, see **SCHOOLS AND SCHOOL DISTRICTS**, 4.

1. **INDICTMENT AND INFORMATION—ROBBERY—ATTEMPT—LANGUAGE OF STATUTE.** An information charging an attempt to commit robbery is not insufficient in that the physical acts done towards the commission of the offense are not set forth, where it follows the language of Rem. & Bal. Code, § 2418, defining robbery and charges the defendant with an attempt to do the precise thing recited in the statute as constituting the crime. *State v. Baker*..... 589
2. **INDICTMENT AND INFORMATION—CONVICTION OF LESSER OFFENSE—ASSAULT AND BATTERY.** Under the rule that at common law an indictment for assault and battery need not set out the particular acts of violence constituting the offense, a conviction for assault in the third degree (defined by Rem. & Bal. Code, § 2415, as an assault or assault and battery not amounting to the first or second degree) may be had under an information for manslaughter charging an assault upon a pregnant woman and her unborn child with intent to cause a miscarriage and resulting in her death, where, omitting that portion relating to the death, it satisfies all requirements of a charge of assault and battery. *State v. Hamilton*..... 561

**INDORSEMENT:**

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1.

**INDUSTRIAL INSURANCE:**

See **INSURANCE**, 2.

**INFORMATION:**

Criminal accusation, see **INDICTMENT AND INFORMATION**.

## INJUNCTION:

Certiorari to review order denying temporary injunction, see CERTIORARI.

Submission of issue of damages to jury, see TRIAL, 3.

Enjoining obstruction of outlet of lake, see WATERS AND WATER COURSES, 2-7.

## INSANE PERSONS:

Insanity as defense to crime, see CRIMINAL LAW, 7, 8.

Presumption as to regularity of order discharging guardian, see JUDGMENT, 2.

1. INSANE PERSONS—RESTORATION OF SANITY—CONVEYANCE—MENTAL CAPACITY. Where a person who had been adjudged insane was discharged as restored to capacity and his guardian discharged and he thereupon sold real estate for \$2,500, the fact that two days later it was resold by the purchaser for \$4,100 does not indicate that the sale was invalid for want of mental capacity. *Jorgenson v. Winter* ..... 573
2. INSANE PERSONS—RESTORATION OF SANITY—DISCHARGE OF GUARDIAN—JURISDICTION—NOTICE—ADVERSARY PROCEEDING. Under Rem. & Bal. Code, § 1671, providing that when the court shall receive information that an insane ward has recovered his reason, it shall immediately inquire into the facts, and discharge the ward if found to be of sound mind, no notice to the ward is necessary to authorize a discharge of the guardian, since the court has jurisdiction through the appointment and qualification of the guardian, and the proceeding is not an adversary proceeding requiring notice. *Jorgenson v. Winter* ..... 573

## INSANITY:

See INSANE PERSONS.

## INSPECTION:

Duty to inspect unsafe appliance, see NEGLIGENCE, 6.

## INSTRUCTIONS:

Review as dependent on exceptions in lower court, see APPEAL AND ERROR, 5, 6.

Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 23.

In criminal prosecutions, see CRIMINAL LAW, 9, 10; FORGERY; RECEIVING STOLEN GOODS, 2.

In civil actions, see TRIAL, 2.

## INSURANCE:

1. INSURANCE—AGENTS—SCOPE OF AUTHORITY. An adjuster of a bonding company may be assumed to have authority to bind the company by its promise to pay a claim, where he was held out by

## INSURANCE—CONTINUED.

the company as its adjuster having general authority over several states, and no notice was given that he had no authority to settle claims in excess of \$250. *Yost v. Empire State Surety Co.*..... 397

2. INSURANCE—POLICY—CONSTRUCTION—LIFE OR ACCIDENT POLICY—“INDUSTRIAL INSURANCE.” An accident policy with premiums payable monthly, expiring one year after issuance, which made provision for weekly indemnity for disability and referred to the special class of employment in which the insured was engaged, although it also covers loss of life from “external, violent, and purely accidental means,” is an “industrial” or accident policy and not a “life” insurance policy, within the meaning of Rem. & Bal. Code, §§ 6155 and 6159, providing that no policy of life or endowment insurance, except policies of industrial insurance where the premiums are payable monthly, shall be issued unless it contains all the provisions of the entire contract including the representations made, with the application attached, and unless so attached, it shall not be considered or received in evidence; hence in an action thereon, evidence as to the insured’s assignment of his wages for the payment of premiums is admissible, although not part of the application. *Pride v. Continental Casualty Co.*..... 428
3. INSURANCE—ACCEPTANCE OF POLICY—EVIDENCE—SUFFICIENCY. An acceptance by the assured of a policy of fire insurance issued to take the place of another, is shown, notwithstanding the assured retained the other policy, where the assured at the time of the fire had no knowledge of the attempted substitution which was arranged by an agent acting as factor for both parties; and on being consulted, after the fire, informed the defendant company that he proposed to hang on to all of the policies. *Finley v. Western Empire Insurance Co.* 673
4. INSURANCE—DEFENSES—ESTOPPEL—PARTICIPATION IN ADJUSTMENT. A fire insurance company admits its liability and is estopped to claim that the policy was not accepted or in force, where it issued and delivered the policy August 22, dating its liability from August 20, and accepted proofs of a loss occurring August 21, and participated in an adjustment based on the validity of four policies that relieved it of one-fourth of its liability, and issued its check therefor. *Finley v. Western Empire Insurance Co.*..... 673
5. INSURANCE—AUTOMOBILE POLICY—MISREPRESENTATIONS—WARRANTIES—EFFECT. In an application for an automobile policy, statements that it was a new machine and not second hand and had cost a specified sum, are warranties and not representations, where the parties have stipulated in the policy that the statements are material and if untrue shall avoid the policy, and being affirmative and not promissory warranties, no recovery can be had on the policy where the statements were untrue. *Miller v. Commercial Union Assurance Co.* ..... 529

INSURANCE—CONTINUED.

6. INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS. An industrial accident policy lapses and is forfeited, where the premiums were to be deducted each month from the wages of the insured, who, for three consecutive months, quit the service and drew his full pay before the deductions could be made, giving no notice of his change in employment as required by the policy, which provided that no recovery could be had after default and prior to reinstatement. *Pride v. Continental Casualty Co.*..... 428
7. INSURANCE—WARRANTY—BREACH—WAIVER—KNOWLEDGE OF AGENT. Where the insured fully and truthfully disclosed his condition to the insurance agent who procured the policy, a warranty clause in the policy will not be held breached for a cause known to the agent before the application was signed, since the knowledge of the agent is the knowledge of the principal, and the company will be held to have waived the written warranties in so far as they are not in harmony with the facts disclosed. *Turner v. American Casualty Co.* ..... 154
8. INSURANCE—ACTIONS ON POLICY—PLEADING—REPLY—DEPARTURE. In an action upon a policy of accident insurance, in which the defendant pleaded warranties in the application and breaches thereof, in that plaintiff had an atrophied leg, warranted as sound except for a slight weakness in the ankle, it is not a departure for the plaintiff to reply that he had an atrophied leg, which he disclosed to the agent and to deny that it was a bodily infirmity except to the extent mentioned in the application, i. e., a slight weakness in the ankle. *Turner v. American Casualty Co.*..... 154
9. INSURANCE—ACTIONS ON POLICY—PLEADING AND ISSUES—BREACH OF WARRANTY—BURDEN OF PROOF. In an action upon a policy of accident insurance, in which the defendant alleged a breach of warranty, in that plaintiff had an atrophied "skeleton" leg much smaller and weaker than the other, which plaintiff had warranted as sound except for a slight weakness in the ankle, a reply admitting an atrophy of the leg and a diminution in its size, but denying that it caused any infirmity other than a weak ankle, as stated in the application, raises an issue of fact for the jury, and it is error to rule, as a matter of law, that the reply admits a breach of warranty; the burden of proving the breach of warranty being upon the defendant. *Turner v. American Casualty Co.*..... 154

INTENT:

- Of grantor, see DEEDS, 1, 2.
- Of testator, see WILLS, 2, 3.

INTEREST:

- Element of damages in general, see DAMAGES, 3.
- Default in payment of, see MORTGAGES, 1.

**INTEREST—CONTINUED.**

1. **INTEREST — RATE—CONTRACT—FRAUD—MORTGAGE NOTE—FRAUDULENT REPRESENTATIONS.** Only seven per cent per annum can be collected on the foreclosure of a mortgage, where the note called for 108 monthly payments, each of which was slightly in excess of the accrued interest at date of payment, thereby decreasing the principal, and was ingeniously drawn with much detail, studiously avoiding any express statement relative to the annual rate of interest, so that it required considerable intelligence and business capacity to understand its import, and the payee represented that it called for less than seven per cent per annum, when in fact the interest aggregated nearly twelve per cent on the unpaid principal, and the makers had agreed to make a loan at seven per cent and failed to comprehend the legal effect of the intricate and involved expressions employed, and believed and acted upon the representations that it called for less than seven per cent. *Equitable Sav. & Loan Ass'n v. Barnes.* 1

**INTOXICATING LIQUORS:**

1. **INTOXICATING LIQUORS—OFFENSES—SALE TO INDIAN—"DISPOSING OF."** One who, with money furnished by an Indian, procures intoxicating liquor and delivers the same to him, is guilty of a felony within Rem. & Bal. Code, § 6288, making it a felony to sell, give away, dispose of, exchange, or barter spirituous liquors of any kind to an Indian. *State v. Reese*..... 437
2. **INTOXICATING LIQUORS—LICENSES—TRANSFER—DESCENT—TROVER AND CONVERSION—PROPERTY.** A retail liquor license is property which passes to personal representatives on the death of the holder, as against third persons unlawfully converting the same to their own use, where the city charter and ordinances provides for transfers by and with the consent of the city council or to *bona fide* purchasers. *Jaffe v. Pacific Brewing & Malting Co.*..... 308

**JAILS:**

Alleging conviction of jail breaking as infamous crime, in prosecution for false swearing in registration oath, see **ELECTIONS**, 7.

**JEOPARDY:**

Former jeopardy, see **CRIMINAL LAW**, 2, 3.

**JOINT ADVENTURES:**

See **PARTNERSHIP**, 1.

**JUDGES:**

Conduct of, see **CRIMINAL LAW**, 6.

Transfer of cause to other judge, vacation of order, see **JUDGMENT**, 1.

Assumption of facts in charge to jury, see **TRIAL**, 2.

Transfer of cause to another judge, affidavit of prejudice, see **VENUE**.

**JUDGMENT:**

Review, see **APPEAL AND ERROR**.

Vacation of judgment forfeiting bail bond, see **BAIL**, 1, 2.

Violation of as contempt, see **CONTEMPT**.

Suspension of judgment convicting insane person, see **CRIMINAL LAW**, 7, 8.

Against community, exemptions, see **HUSBAND AND WIFE**, 1.

Form of, enjoining city from obstructing outlet of lake, see **WATERS AND WATER COURSES**, 7.

1. **JUDGMENTS—VACATION—NOTICE.** An order transferring the cause to another judge, upon an affidavit of prejudice, can only be vacated for fraud in procuring it, after a hearing and the notice required by Rem. & Bal. Code, §§ 242, 244. *Garvey v. Skamser*... 259
2. **JUDGMENT—JURISDICTION—PRESUMPTIONS—COLLATERAL ATTACK.** An order discharging a guardian of an insane person by a court having general jurisdiction, will be presumed to have been regularly made until the contrary appears, and is conclusive on collateral attack. *Jorgenson v. Winter*..... 573
3. **JUDGMENT—CONCLUSIVENESS—PERSONS CONCLUDED.** A judgment against the holder of a contract for the purchase of land from the state, determining his right to the waters of a stream, is conclusive upon one deriving his title through the grantee of the state, to whom the contract holder assigned the contract. *State ex rel. Olding v. Stampfy*..... 368
4. **JUDGMENT—CONCLUSIVENESS—VACATION—ACTION—LACHES.** A defendant is estopped by laches and by a restraining order, unappealed from, from attacking a judgment on the ground of fraud, where, on his appeal from an order refusing to vacate the judgment on his petition, the appeal was dismissed because he had failed to obtain permission of the supreme court to attack the judgment, and for three years thereafter neglected to obtain such permission, and was meanwhile restrained from bringing any action affecting plaintiff's title to the land which was the subject of the former suit. *Kath v. Brown* ..... 306
5. **JUDGMENT—RES JUDICATA—MATTERS DETERMINED—EVIDENCE—SUFFICIENCY—PARTIES.** In an action to foreclose mortgages a plea of former adjudication is established where plaintiff admitted that, in a former action brought against him by the defendant for wages, he (the plaintiff) had set up in defense an indebtedness to him for advances made which he sought to recover and which was represented in part by the mortgages, and the case was submitted to a jury with directions to bring in a verdict in favor of the party to whom any balance was due; and it is immaterial that the parties were not all the same in both actions, the other persons not being primarily interested and merely proper parties. *Kaufman v. Klain* ..... 113

**JUDGMENT—CONTINUED.**

6. **JUDGMENT—RES JUDICATA—APPEAL—EFFECT.** An appeal from a judgment does not suspend its effect as *res judicata*. *Kaufman v. Klain* ..... 113
7. **JUDGMENT—RES JUDICATA—COLLUSIVE ACTION—MATTERS AND PARTIES CONCLUDED.** The denial of a motion to vacate the appointment of a receiver of a corporation, entered in a collusive suit through *ex parte* proceedings, is not *res judicata* or a bar to a subsequent suit by the corporation to vacate the receivership and set aside the sales made therein. *Goodale Phonograph Co. v. Valentine* ..... 263

**JUDICIAL NOTICE:**

In criminal prosecutions, see **CRIMINAL LAW**, 1.

**JURISDICTION:**

Appellate jurisdiction, see **APPEAL AND ERROR**, 1, 2.  
To determine sanity of accused, see **CRIMINAL LAW**, 7.  
Of courts in divorce proceedings, see **DIVORCE**, 4, 7.  
Proceedings to restore ward to capacity, see **INSANE PERSONS**, 2.  
Presumption as to, see **JUDGMENT**, 1.  
Of tribunal over proceeding in which false oath is taken, see **PER JURY**, 2.  
To try case, after application for change of venue, see **VENUE**.

**JURY:**

Instructions in criminal prosecutions, see **CRIMINAL LAW**, 9, 10.  
Assessment of damages in condemnation proceedings, see **EMINENT DOMAIN**, 6, 13.  
Instructions in civil actions, see **TRIAL**, 2.  
Verdict in civil actions, see **TRIAL**, 1, 3.

**JUSTIFICATION:**

Of actionable words, see **LIBEL AND SLANDER**, 3, 4.

**KNOWLEDGE:**

Of falsity of instrument uttered, see **FORGERY**.  
Of agent as binding principal, see **INSURANCE**, 7.  
As affecting assumption of risks by servant, see **MASTER AND SERVANT**, 14.  
Of theft of goods, see **RECEIVING STOLEN GOODS**.

**LACHES:**

Effect in equity, see **EQUITY**.  
As bar to vacation of judgment, see **JUDGMENT**, 4.  
In rescission of contract of sale, see **VENDOR AND PURCHASER**, 3.



**LAKES:**

Enjoining obstruction of outlet, see **WATERS AND WATER COURSES**, 2-7.

**LANDLORD AND TENANT:**

Liquidated damages for breach of lease, see **DAMAGES**, 1.

Lease with agreement for renewal as within statute of frauds, see **FRAUDS, STATUTE OF**, 3.

Assessment against leasehold for public improvement, see **MUNICIPAL CORPORATIONS**, 19, 25, 30, 37.

Liability of owner for negligence of lessee, see **NEGLIGENCE**, 1.

1. **LANDLORD AND TENANT—LEASE—AGREEMENT FOR RENEWAL.** A lease for one year with the privilege of two year's renewal at a rental satisfactory to both lessor and lessee, is a single contract, calling for renewal at a reasonable rental, and not subject to the objection that the agreement for renewal was without consideration or unenforcible. *Anderson v. Frye & Bruhn*..... 89
2. **LANDLORD AND TENANT—LEASE—TERMINATION.** An unacknowledged lease for a term exceeding one year being void, except as a lease from month to month, may be terminated by proper notice before the expiration of the year. *Anderson v. Frye & Bruhn*.... 89
3. **LANDLORD AND TENANT—RENT—LIQUIDATED DAMAGES—WAIVER.** The retaking of possession for default in the payment of rent does not waive the lessor's right to the liquidated damages stipulated for in the lease. *Barrett v. Monro*..... 229
4. **LANDLORD AND TENANT—RENT—DEPOSIT AS LIQUIDATED DAMAGES.** A stipulation in a lease that a deposit of \$1,200 made at the beginning of the term shall be held by the lessors to indemnify them against any loss or damage which they may sustain by reason of any violation of the terms of the lease on the part of the lessees, as liquidated damages, is one for liquidated damages and not merely for security, and entitles the lessor to retain the whole deposit, upon termination of the lease for nonpayment of rent; the actual damages from default being incapable of exact determination. *Barrett v. Monro* ..... 229

**LANDS:**

See **PUBLIC LANDS**.

**LARCENY:**

See **RECEIVING STOLEN GOODS**.

Slander in charging crime of, see **LIBEL AND SLANDER**, 2, 3.

**LAST CLEAR CHANCE:**

To avoid accident, see **CARRIERS**, 4.

**LATERAL SUPPORT:**

Damages for removal of, see **ADJOINING LANDOWNERS**.

**LEASES:**

See **LANDLORD AND TENANT**.

**LEAVE TO SUE:**

Action against receiver, see **RECEIVERS**, 1.

**LETTERS:**

Of administration, right to, see **EXECUTORS AND ADMINISTRATORS**.

**LEVY:**

Of city taxes, see **MUNICIPAL CORPORATIONS**, 2.

Of assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 14-19, 22-26, 30-38.

**LIBEL AND SLANDER:**

1. **LIBEL AND SLANDER—PRIVILEGED COMMUNICATION—CHURCH PROCEEDINGS—REPORT OF COMMITTEE AS MALICE.** A church committee's report upon an investigation of a minister who desired to be called, made according to the established rules of the church of which the minister was a member, is absolutely privileged, whether it contains matter libelous *per se* or not; and when on its face it shows that it was made in good faith, it disproves malice. *Bass v. Matthews*. 214
2. **LIBEL AND SLANDER—INSTRUCTIONS—CHARGE OF LARCENY.** In an action for slander in applying the word "thief" to an agent who had taken his principal's money, it is proper to instruct that defendant must show on his plea of justification, that the plaintiff not only took the money, but did so with criminal intent, where the plaintiff had full charge of the business, receiving all moneys and paying all demands, including his own salary, and claimed that he took the money under a good faith claim that he was entitled to take it to pay a debt. *Eddy v. Cunningham*..... 544
3. **SAME—WORDS ACTIONABLE—"THIEF"—JUSTIFICATION.** Since calling plaintiff a "thief," is only *prima facie* actionable, malice being the gravamen of the charge, the defendant would not be liable if the words were used merely as terms of abuse in relation to a transaction that was fraudulent but not criminal, and justified by the attending circumstances and relations of the parties. *Eddy v. Cunningham* ..... 544
4. **SAME—"PIMP"—JUSTIFICATION—TRUTH OF CHARGE—EVIDENCE.** In an action for slander in calling a man a "pimp," the plaintiff was "living with" a prostitute, within Rem. & Bal. Code, § 2440, and the defendant was accordingly justified, where it appears that the plaintiff was a clerk in a hotel where prostitutes frequently stopped

**LIBEL AND SLANDER—CONTINUED.**

for several days at a time, and that as a rule he assigned them to a room convenient to his own, and consorted with one of them regularly and with others occasionally, although there was no proof that they "lived with" each other as man and wife. *Eddy v. Cunningham* ..... 544

**LICENSES:**

For sale of intoxicating liquors, see **INTOXICATING LIQUORS**, 2.

**LIENS:**

See **MECHANICS' LIENS**.

Mortgage, see **CHATTEL MORTGAGES; MORTGAGES**.

**LIFE INSURANCE:**

See **INSURANCE**, 2.

**LIMIT:**

Of assessment district, see **MUNICIPAL CORPORATIONS**, 20.

Of assessment for improvement, see **MUNICIPAL CORPORATIONS**, 22-24.

**LIMITATION OF ACTIONS:**

See **ADVERSE POSSESSION**, 1; **BILLS AND NOTES**, 6.

Wife's right of action for division of community property, see **DIVORCE**, 6.

Laches, see **EQUITY**.

1. **LIMITATION OF ACTIONS—STATUTES—PROVISO—EFFECT ON PREEXISTING CAUSES—CONSTRUCTION—CANCELLATION OF TAX DEED.** Where, prior to the passage of an act, the shortest period of limitation for the commencement of an action to set aside a tax deed and recover lands sold for taxes was seven years, and the act was passed limiting such actions to three years, "provided, this act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of the act," actions on all deeds issued prior to the passage of the act are barred unless commenced within one year after the passage of the act. *Hoko River Boom Co. v. Fairservice*..... 357
2. **LIMITATION OF ACTIONS—CONTRACT LIMITATION—INDEMNITY BOND—REASONABLE EXCUSE FOR DELAY.** A limitation in an indemnity bond, requiring actions to be commenced within six months after the completion of the work, will be enforced, if there is no reasonable excuse for the delay; and it is not a reasonable excuse for a delay of three years that the plaintiff mistook his remedy upon advice of counsel, first unsuccessfully waging a suit upon an architect's certificate which he had obtained by fraudulent means, which suit was not dismissed until more than two years after the time for commencing the proper action had expired. *Ilse v. Aetna Indemnity Co.* ..... 484

## LIMITATION OF ACTIONS—CONTINUED.

3. **LIMITATION OF ACTIONS—FOREIGN CORPORATIONS—CONTRACT LIMITATIONS—EXCEPTIONS.** The rule that statutes of limitations do not run in favor of a foreign corporation, because it is "out of the state" and so within the exception of Rem. & Bal. Code, § 168, has no application to the contract limitation in an indemnity bond which disclosed the foreign sovereignty of the company and names no exceptions. *Ilse v. Aetna Indemnity Co.*..... 434

## LIQUIDATED DAMAGES:

See DAMAGES, 1, 2.

Stipulation in lease for, see LANDLORD AND TENANT, 3, 4.

On breach of contract of sale, see SALES, 4, 7, 8.

## LIS PENDENS:

Notice of rights of purchaser, see VENDOR AND PURCHASER, 4.

## MACHINERY:

Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 1-7.

## MALICE:

See LIBEL AND SLANDER, 1.

## MALICIOUS PROSECUTION:

1. **MALICIOUS PROSECUTION—SEARCH PROCEEDINGS—NAMING PLAINTIFF.** A malicious prosecution may be based upon search proceedings; and Rem. & Bal. Code, §§ 2237, 2239, not requiring the proceedings or warrant to designate the person suspected, it is not necessary that the proceedings name the plaintiff as the suspected party. *Olson v. Haggerty*..... 48
2. **SAME—DESIGNATION OF PREMISES.** A search warrant describes the plaintiff's "place of residence" so as to enable her to maintain an action for malicious prosecution, where it mentions the dwelling and premises of another wherein the plaintiff was a "resident, lodger, and inmate," and where it appears that the relation of landlord and tenant did not exist between the plaintiff and the owner of the house, and plaintiff did not maintain a distinct establishment therein. *Olson v. Haggerty*..... 48
3. **SAME—SUFFICIENCY OF WARRANT—LIABILITY OF INSTIGATOR.** One who institutes search proceedings and directs the sheriff's search of plaintiff's effects thereunder may be guilty of malicious prosecution, even if the search warrant was technically insufficient to protect the officer. *Olson v. Haggerty*..... 48
4. **SAME—LIABILITY—ESSENTIALS—ARREST OR SEIZURE OF PROPERTY.** The arrest of the person or the seizure of property is not essential to sustain an action for malicious prosecution in the institution of search proceedings. *Olson v. Haggerty*..... 48

**MALICIOUS PROSECUTION—CONTINUED.**

5. **SAME—DAMAGES—SPECIAL DAMAGES.** The disgrace, humiliation and public suspicion caused by a search warrant to recover stolen goods are sufficient elements of damage to sustain a substantial recovery for malicious prosecution, without proof of pecuniary loss or special damage. *Olson v. Haggerty*..... 48

**MALPRACTICE:**

See **PHYSICIANS AND SURGEONS**, 2.

**MANDAMUS:**

1. **MANDAMUS—WHEN LIES—ORDERS OF SCHOOL SUPERINTENDENTS—QUESTIONS REVIEWABLE BY APPEAL.** In mandamus proceedings to compel the prosecuting attorney to test the validity of an order of the school superintendent consolidating two school districts, the wisdom or policy of the order cannot be inquired into, where the same can be reviewed by appeal; since it is a collateral attack on the order and only its validity can be questioned. *State ex rel. Harris v. Ward*..... 342

**MANSLAUGHTER:**

Conviction of lesser offense, see **INDICTMENT AND INFORMATION**, 2.

**MARRIAGE:**

Dissolution of, see **DIVORCE**.

**MASTER AND SERVANT:**

Liens for labor and materials, see **MECHANICS' LIENS**.

Employees of municipal corporations, see **MUNICIPAL CORPORATIONS**, 7, 9.

Contract to furnish medical and surgical treatment to employee, see **PHYSICIANS AND SURGEONS**, 1.

Quo Warranto by city employee, see **QUO WARRANTO**.

Agreement to make gift of property in consideration of personal services, see **WORK AND LABOR**.

1. **MASTER AND SERVANT—INJURIES—SAFE PLACE AND APPLIANCES—TUNNEL—AIR FAN—NEGLIGENCE—EVIDENCE—SUFFICIENCY.** The evidence is insufficient to sustain a verdict for the wrongful death of an employee, asphyxiated in a tunnel through the alleged insufficiency of the fan supplying fresh air to the workings, where it appears that the fan was under the control of the deceased, who understood it and turned it on or off as desired, that when his body was found, the fan was not working, and he either entered the tunnel in the morning without turning on the fan to clear out the foul air, or turned it off too soon, that the fan was in working order the night before and shortly after he was found, and if left running long enough, it furnished sufficient fresh air, no complaints of it

## MASTER AND SERVANT—CONTINUED.

- having been made; and failure to use reasonable care is not shown merely by the evidence of a witness that sometimes the air was pretty bad and made him drowsy and weak in the knees, or by the fact that it took from half an hour to an hour and a half to clear out the air after shots. *Johnston v. Superior Portland Cement Co.* ..... 250
2. MASTER AND SERVANT—SAFE APPLIANCE—EVIDENCE—SUFFICIENCY. The fact that a resaw started automatically is insufficient to establish negligence in not providing proper tension for a belt connecting the machine with the power, where the plaintiff offered no evidence on the subject and defendant's witnesses testified that the belt was kept at all times in such a tension that it would not start the machine automatically. *Dolan v. Slade Lumber Co.*..... 22
3. SAME—GUARDING MACHINERY—QUESTION FOR JURY. Whether the gears of a resaw should have been guarded under the factory act, requiring the guarding of all gearing with which employees are liable to come in contact, is for the jury, where it appears that they could have been advantageously guarded, and that the operator was liable to come in contact with the gears whenever it became necessary to adjust the rolls, although the operator was expected to stop the machine before adjusting the rolls. *Dolan v. Slade Lumber Co.* ..... 22
4. MASTER AND SERVANT—INJURIES—NEGLIGENCE—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE. An employer is responsible for injuries to his servant, a derrickman, caused by the fall of a boom through an insufficient number of coils of cable on the drum, where his failure to furnish sufficient cable was as much the proximate cause of the accident as the negligence of the engineer in allowing too much cable to run off the drum. *Ulrickson v. Soderberg*..... 347
5. SAME—ASSUMPTION OF RISKS. The operator of a resaw does not assume the risk from the automatic starting of the machine from the fact that he knew that it had once before so started and failed to notify the employer thereof, since the employer may have had other notice. *Dolan v. Slade Lumber Co.*..... 22
6. MASTER AND SERVANT—INJURIES—ASSUMPTION OF RISKS. An operator of a saw assumes the risk of dangers from the fact that no adequate means had been provided for stopping the saw when slivers should become lodged in it, as the defect was open and obvious; and also of the dangers incident to sawing cants cut from top logs, by reason of the greater prevalence of splinters in top logs, he having had notice of such fact without special warning thereof. *Harkins v. Veness Lumber Co.*..... 196
7. MASTER AND SERVANT—SAFE APPLIANCES—PROMISE—ASSUMPTION OF RISKS—QUESTION FOR JURY. It is for the jury to determine whether there was contributory negligence, and whether the servant

## MASTER AND SERVANT—CONTINUED.

- could rely on a promise, where it appears that the foreman in a lumber camp promised to furnish the plaintiff, employed in sawing trees, with an undercutter rigging for making undercuts, that the appliance would have rendered his work safer, that he relied on the promise, and was injured while attempting to cut up two logs as directed, being unable to make the cut of the lower log first for want of the rigging. *Hendrickson v. Simpson Logging Co.*..... 72
8. SAME—PROMISE—REASONABLE TIME—QUESTION FOR JURY. In such a case, it is for the jury to say whether the lapse of three or four days after the promise was a reasonable length of time in which plaintiff might rely thereon. *Hendrickson v. Simpson Logging Co.* ..... 72
9. SAME—OPERATION OF MACHINERY—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. It is for the jury to say whether it was contributory negligence for an operator to attempt to adjust the rolls of a resaw without stopping the machine, the thumbscrew being near the gears, although defendant's witnesses testified that he was expected to do so. *Dolan v. Slade Lumber Co.*..... 22
10. MASTER AND SERVANT—INJURIES—SAFE PLACE—CONTRIBUTORY NEGLIGENCE—COMPLAINT—SUFFICIENCY. A complaint for injuries to a coal miner from falling overhead rock is not demurrable as showing contributory negligence from the fact that it admitted that plaintiff went to work in a place "apparently somewhat unsafe" from want of timbers, which defendant had failed to supply, and which for that reason relieved the plaintiff from the assumption of risks. *Aho v. Coast Coal Co.*..... 43
11. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, it is for the jury to say whether plaintiff was guilty of contributory negligence in failing to block the log that rolled on him, in failing to cut the log as marked, or in not adopting the proper avenue for escape, where there was evidence that he blocked the log, and considered it safely blocked, but some of the supports fell, that he used his judgment in making the cut, and in endeavoring to escape he was compelled to act hurriedly. *Hendrickson v. Simpson Logging Co.*..... 72
12. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. Upon a dispute in the evidence as to whether a special warning should have been given to a sawyer of the danger from attempting to remove wedged splinters with his hands, the question of his contributory negligence in so doing is for the jury. *Harkins v. Veness Lumber Co.* ..... 196
13. SAME—CHOICE OF METHODS. In such a case, he is not guilty of contributory negligence in not adopting the safe way by having the mill shut down, when no method had been provided for his stopping

**MASTER AND SERVANT—CONTINUED.**

- the mill without leaving his post, and it is doubtful if that method of removing slivers was contemplated. *Harkins v. Veness Lumber Co.* ..... 196
14. **SAME—UNSAFE METHODS OF WORK—KNOWLEDGE.** A sawyer is not chargeable with knowledge that the removal of wedged splinters with the hands is unsafe merely because he may know of other safe ways of doing it. *Harkins v. Veness Lumber Co.*..... 196
15. **MASTER AND SERVANT—INJURIES—NEGLIGENCE—OPERATION OF RAILROADS.** A complaint by a track worker, who sustained a hernia through extraordinary exertions in removing a hand car from a track when an engine was approaching, is demurrable for want of sufficient facts, where there was no allegation that he was ordered to use extraordinary exertion, that an insufficient number of trackmen were employed, the engine out of repair, or not under sufficient control to avoid a collision, the track not in proper condition, or that the hand car should not have been on the track in the first instance. *Ervin v. Northern Pac. R. Co.*..... 240
16. **MASTER AND SERVANT—INJURY TO SERVANT—ACTIONS—ISSUES AND PROOF—INSTRUCTIONS.** In an action for injuries caused by the automatic starting of a resaw, through the alleged improper tension of the power belt by reason of too great a weight thereon, it is error to admit evidence that a belt-shifter would have been a safer device for starting the machine than a weight on the belt to increase its tension, and to instruct that the lack of a belt-shifter can be considered by the jury only in determining whether the belt was kept at proper tension; since the question whether a belt-shifter would have been safer can have no bearing on the question of the tension on the belt. *Dolan v. Slade Lumber Co.*..... 22

**MATERIALS:**

Duplicate statement to owner of materials furnished contractor, see **MECHANICS' LIENS**, 3, 4.

**MATURITY:**

Election to declare debt due, on sale by chattel mortgagee to preserve security, see **BILLS AND NOTES**, 6.  
Of mortgage for default in payment of interest, see **MORTGAGES**, 1.

**MEANDER LINE:**

See **WATERS AND WATER COURSES**, 6.

**MEASURE OF DAMAGES:**

See **DAMAGES**.  
For breach of contract, see **SALES**, 3.



**MECHANICS' LIENS:**

1. **MECHANICS' LIENS—PROCEEDINGS—SEPARATE HOUSES—SEGREGATION OF ACCOUNT—NECESSITY.** One mechanics' lien on four houses belonging to the defendant cannot be asserted for a balance due the contractor on one entire contract for the four houses and one other house belonging to another in which the defendant had no interest, where the plaintiff did not keep separate accounts with the several buildings and cannot segregate the account against each property. *Sarginson v. Turner Investment Co.*..... 234
2. **MECHANICS' LIENS—CONTRACT—SUBSTANTIAL PERFORMANCE.** There is a substantial performance of a contract for the plate glass for a large building, entitling the contractor to a mechanics' lien, where only two plates, of the value of \$30, were faulty, and plaintiff offered to replace them or make a proper deduction. *Belknap Glass Co. v. Brown* ..... 127
3. **MECHANICS' LIENS — MATERIALMEN — DUPLICATE STATEMENTS TO OWNER—NECESSITY.** Where a contractor for a building defaulted and went into the hands of a receiver, and the receiver and the agent of the owner notified a subcontractor for the tile and mantel work to proceed with the performance of its subcontract, thereby recognizing and adopting the same, the subcontractor need not give the owner duplicate statements of materials furnished, as it is not a materialman, within the meaning of Rem. & Bal. Code, § 1133, providing that no lien for materials shall be enforced unless duplicate statements shall be sent to the owner of all materials furnished to any person or contractor, that section having no application to materials furnished direct to the owner on a contract made by the owner's agent. *Ringel v. Newman*..... 583
4. **SAME — DUPLICATE STATEMENTS — SUFFICIENCY.** The duplicate statement of all materials or supplies furnished to any person or contractor, required by Rem. & Bal. Code, § 1133, to be delivered to the owner, need not specify the prices charged therefor, but is sufficient if it shows the kind and quality of the materials furnished. *Ringel v. Newman* ..... 583

**MEMORANDA:**

Admissibility of to aid in construing contract, see **CONTRACTS**, 2.

**MENTAL CAPACITY:**

To convey real estate, see **INSANE PERSONS**, 1.

**MINES AND MINERALS:**

Laches as affecting recovery for fraud in sale of stock, see **EQUITY**,  
 Fraud in sale of mining stock, see **FRAUD**.

Collateral attack on foreclosure sale of mining claims, see **TAXATION**,  
 3-6.

**MISREPRESENTATION:**

See FRAUD.

In sale of corporate stock, see CORPORATIONS, 2, 3.

By insured, see INSURANCE, 5.

As to rate of interest in note, see INTEREST.

By agent as to title, see PRINCIPAL AND AGENT.

**MISTAKE:**

Possession under mistaken boundary line, see ADVERSE POSSESSION, 2.

In payment by note of third party, see PAYMENT.

In homestead location, see PUBLIC LANDS.

**MODIFICATION:**

Of assessment for public improvement, see MUNICIPAL CORPORATIONS, 30.

**MONEY LOANED:**

For gambling purposes, see GAMING.

**MONEY RECEIVED:**

Recovery of price paid for goods, see SALES, 5, 6.

1. MONEY RECEIVED—FRAUD—NOTICE—EVIDENCE—SUFFICIENCY. Where a bank, holding a forged note and mortgage as collateral, had notice that their genuineness was denied, and received part of the purchase money when the owner sold the collateral and procured the bank to assign the same to the purchaser, who relied on the genuineness of the note and mortgage, the bank is liable to the purchaser for the money received by it in the transaction. *Zwickel v. American Savings Bank & Trust Co.*..... 211

**MONOPOLIES:**

Grants of privileges or immunities, see CONSTITUTIONAL LAW, 2.

**MOOT QUESTIONS:**

Review on appeal, see APPEAL AND ERROR, 11.

**MORTGAGES:**

Personal property, see CHATTEL MORTGAGES.

Interest on foreclosure of, see INTEREST.

1. MORTGAGES—MATURITY—DEFAULT IN INTEREST—CONSTRUCTION OF CONTRACT. A mortgage matures and may be foreclosed for the whole sum, upon default in the payment of annual interest, where the mortgage note provided for interest payable annually "and if not so paid to become a part of the principal and bear interest until so paid," and the mortgage provided for its foreclosure in case of any default in the payment of interest when the same becomes due under the terms of the note, and further stipulated that in case

**MORTGAGES—CONTINUED.**

of foreclosure, "the whole of said principal and interest, whether the same shall be then due or not" shall be retained. *Castor v. Muramoto* ..... 145

2. **MORTGAGES—REDEMPTION—AGREEMENT—ESTOPPEL.** A redemption from a mortgage foreclosure will be decreed in favor of heirs owning a half interest in the land, where the purchaser at the foreclosure sale had agreed to assign the sheriff's certificate of sale upon payment of the judgment and to make a quitclaim to one of the heirs, to enable him to negotiate a loan on the property on behalf of minor heirs in order to effect the redemption; and after permitting the time for a regular redemption to expire, the purchaser is estopped to repudiate the agreement upon tender of the sum due, although proceedings to redeem were not taken in the manner required by statute. *Mohney v. Ellis*..... 643

**MUNICIPAL CORPORATIONS:**

Filing fees from candidates at city primary election, see ELECTIONS, 2.

Condemnation of property, see EMINENT DOMAIN, 1, 2, 7-13.

Injury to children by negligent prosecution of work in street, see NEGLIGENCE, 2, 3.

Quo warranto by employee of city, see QUO WARRANTO.

Subject and title of act extending boundaries of city into adjacent navigable waters, see STATUTES, 2.

Subject and title of act requiring bonds from contractors on public work, see STATUTES, 3.

Liability for obstructing outlet of lake, see WATERS AND WATER COURSES, 3-7.

1. **MUNICIPAL CORPORATIONS—SPECIAL LAWS — BOUNDARIES.** An act extending the boundaries of all cities to the middle of navigable waters adjacent to their boundaries, is not violative of the constitutional provisions inhibiting the incorporation or alteration of cities by special laws, or the enactment of any private or special laws granting corporate powers or privileges. *Pacific American Fisheries v. Whatcom County*..... 291
2. **MUNICIPAL CORPORATIONS—BOUNDARIES—EXTENSIONS — STATUTES.** The boundaries of cities are extended by Rem. & Bal. Code, § 7443, providing that the powers and jurisdiction of all incorporated cities bounded by navigable waters be and the same are hereby extended to the middle of such waters in every manner and for every purpose exercised within the city's limits; and hence authorizes the levy of city taxes upon property situated within the extended limits. *Pacific American Fisheries v. Whatcom County*..... 291
3. **MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—BOND OF CONTRACTORS—DEFENSES.** In an action on an indemnity bond, it is not

## MUNICIPAL CORPORATIONS—CONTINUED.

a fatal variance that the contract provided that the work should be done under one ordinance, which ordered the improvement and the bond refers to the fulfillment of the contract under another ordinance, which provided for the plan of a special assessment, the engagement of the bond to underwrite the contract being sufficiently set out. *Yost v. Empire State Surety Co.*..... 397

4. MUNICIPAL CORPORATIONS—CONTRACTS — PUBLIC WORK — BONDS—LIABILITY FOR LABOR AND MATERIAL. The fact that city officers did not have authority to make a contract for a public work, will not avoid the liability of the city to laborers and materialmen for the failure of the city to take a bond from the contractor, as provided by Rem. & Bal. Code, § 1159, where the contractor was engaged in a public work such as the officers had authority to carry on, with their knowledge and consent, and the city had received the benefit of the work. *Hambach v. Ward*..... 351
5. SAME—AMOUNT OF LIABILITY—QUANTUM MERUIT. Rem. & Bal. Code, § 1159, rendering a city liable to laborers and materialmen on public work, if it fails to take a bond from the contractor, creates a liability only upon a *quantum meruit* and not for the "agreed" price of the labor or material. *Hambach v. Ward*..... 351
6. SAME—NATURE OF LIABILITY—PENAL OR REMEDIAL. Rem. & Bal. Code, § 1159, rendering a city liable for labor and materials on public work, if it fails to take a bond from the contractor, is remedial and not penal in its nature, not differing from statutes for mechanics' liens. *Hambach v. Ward*..... 351
7. MUNICIPAL CORPORATIONS—CHARTERS—CONSTRUCTION—CIVIL SERVICE. Under Spokane charter adopting the merit system, section 53, providing that employees in office at the time of the adoption of the charter shall retain their positions unless removed for cause is immediately operative, notwithstanding section 120, providing for a classification of officers and employees which cannot be made until after the election of commissioners three months after adoption of the charter. *State ex rel. Powell v. Fassett*..... 555
8. MUNICIPAL CORPORATIONS—OFFICERS—SALARIES—LIABILITY. In *quo warranto* against a city and an incumbent claiming plaintiff's office, the city is absolved from liability to plaintiff where it had paid the incumbent the entire salary up to the time of the trial. *State ex rel. Powell v. Fassett*..... 555
9. MUNICIPAL CORPORATIONS—OFFICERS—CIVIL SERVICE—TITLE OF OFFICE—ORDINANCES. An ordinance renaming the different positions in a city department, and making the name correspond to the duties, does not affect the right of the incumbent to hold the position under the civil service rules, the duties remaining the same as before and he having taken the requisite examination before the passage of the renaming ordinance. *Gilmur v. Seattle*..... 289

MUNICIPAL CORPORATIONS—CONTINUED.

10. SAME—DISCRETION OF COUNCIL—REVIEW. It is entirely within the discretion of the city to determine the necessity of an improvement, its character, and the materials out of which it shall be constructed. *Knickerbocker Co. v. Seattle*..... 365
11. MUNICIPAL CORPORATIONS—BRIDGES—POWER TO CONSTRUCT. Rem. & Bal. Code, § 7507, authorizing a city to open, establish, grade and plank streets and other public places, and to construct and keep in repair bridges, authorizes the city to construct a bridge or elevated roadway. *Knickerbocker Co. v. Seattle*..... 336
12. SAME—BRIDGES—WHAT CONSTITUTES. An elevated roadway resting on mudsills and stringers, built to bring the street up to the established grade is not a bridge. *Knickerbocker Co. v. Seattle*. 336
13. MUNICIPAL CORPORATIONS—IMPROVEMENTS—PUBLIC PURPOSES—PROCEEDINGS—ORDINANCE. An ordinance for a local improvement by filling tide lands is not invalid by reason of a recital that one of its purposes was for the "general improvement of the property," where it also appears that it was necessary to the public health, sanitation and general welfare, within Rem. & Bal. Code, § 7971. *Martin v. Olympia* ..... 28
14. SAME. The power to levy special assessment for a street improvement is not exhausted by being once exercised. *Knickerbocker Co. v. Seattle* ..... 365
15. MUNICIPAL CORPORATIONS—STREETS—ASSESSMENTS—PERMANENT OR TEMPORARY STREET REPAIRS. The city charter and statute authorizing improvements to be made by planking, a plank roadway is a "permanent" improvement and not repair work, for which an assessment can be made, where it was intended for use until it wears out. *Knickerbocker Co. v. Seattle*..... 365
16. SAME—NATURE OF IMPROVEMENT—TEMPORARY OR PERMANENT. An elevated roadway resting on mudsills, piles and stringers, is a "permanent" improvement for which the property may be assessed, where it was intended to use the same as long as it would last, although the city contemplated the making of a permanent fill later, and did in fact commence filling in underneath the structure shortly after it was built. *Knickerbocker Co. v. Seattle*..... 336
17. SAME—ASSESSMENTS — DISTRICTS — LANDS ASSESSABLE. Rem. & Bal. Code, § 7971 *et seq.*, for the filling of tide and swamp lands by cities, authorizes the assessment of property benefited thereby situated within the assessment district, although it was not part of the land filled in. *Martin v. Olympia*..... 28
18. SAME—PROPERTY SUBJECT TO ASSESSMENT. Property found by the jury to be damaged by an improvement is not subject to an assessment for benefits. *Inner-Circle Property Co. v. Seattle*..... 508

## MUNICIPAL CORPORATIONS—CONTINUED.

19. **MUNICIPAL CORPORATIONS — ASSESSMENTS — INTEREST ASSESSABLE.**  
An ordinance providing that the city treasurer shall collect from the owner of any subdivision of a lot such proportion of the assessment thereon as the city engineer shall certify to be chargeable to such subdivision, was not intended to authorize the segregation of a leasehold interest from the fee. *Seattle Mattress & Upholstery Co. v. Seattle* ..... 666
  
20. **MUNICIPAL CORPORATIONS—STREETS—IMPROVEMENTS — ASSESSMENT DISTRICTS—LIMITS.** Where a section of a city charter contained a proviso that a street assessment district must be coterminous with the portion of the street improved and that the side lines shall not be more than 150 feet distant from the nearest line of the street improved, and the proviso was amended to read that “unless otherwise provided by ordinance” the assessment district shall be coterminous with the portion of the street improved, and “in such case” the side lines shall be 150 feet distant, etc., the amendment is not sufficiently definite and explicit to remove the 150-foot side limit imposed by the original charter provisions. *Cook v. Spokane*.. 526
  
21. **SAME—ASSESSMENT—NOTICE—PRESUMPTIONS.** In an action to set aside a local assessment, the fact that the plaintiff had no notice of the assessment in time to object before the city council is immaterial, if the statutory notice was given, which will be presumed in the absence of allegations to the contrary. *Martin v. Olympia* ..... 28
  
22. **MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—LIMITATIONS—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 7571, which provides that it shall be lawful for a city of the first class to order any improvements the cost of which is to be charged to abutting property when said cost shall not exceed fifty per cent of the valuation of the real estate in the improvement district, a property owner cannot complain of an improvement the cost of which exceeds fifty per cent of such valuation, where no more than such fifty per cent is assessed against the benefited property and the balance is provided by the city from its general fund or other sources. *Hapgood v. Seattle* ..... 497
  
23. **SAME—LIMITATION—IMPROVEMENT DISTRICT.** Rem. & Bal. Code, § 7571, limiting assessments for local improvements to fifty per cent of the valuation of the real estate within the improvement district, does not limit each assessment to fifty per cent of the value of each lot assessed, nor the total assessment to fifty per cent of the value of all the lots assessed; but the limit of the assessable cost is fixed by the total valuation of the real estate within the entire district, even if some of the property therein is not benefited and not subject to assessment. *Hapgood v. Seattle*..... 497

MUNICIPAL CORPORATIONS—CONTINUED.

24. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—EXCEEDING ESTIMATES—EFFECT. The fact that the actual cost of an improvement exceeds the original estimate does not affect the power of the city council to levy an assessment upon property to the extent of benefits received, within the limit allowed by law, where the estimate required by the charter was made by the board of public works to enable the council to act advisedly in ordering an improvement within the fifty per cent limit of the assessed valuations, and no notice to the property owners or hearing upon the amount of the estimate was required or given. *Inner-Circle Property Co. v. Seattle* .....508
25. SAME—ASSESSMENTS—APPORTIONMENT — EVIDENCE — SUFFICIENCY. An assessment for a permanent street fill, charging two-thirds of the cost against leaseholds and one-third against the fee, is sustained, where the lease had twenty-one years to run, with the preference right of renewal, the leaseholds received the whole of the present benefit and are relatively more enhanced in value than the fee, and the evidence as to the benefits was conflicting. *Seattle Mattress & Upholstery Co. v. Seattle*..... 666
26. SAME—ASSESSMENTS—OBJECTIONS—FAILURE TO INCLUDE PROPERTY. An assessment is not invalidated by the failure to assess all the property within the assessment district, in the absence of an affirmative showing that the omitted property was specially benefited, the presumption being that it was not benefited. *Seattle Mattress & Upholstery Co. v. Seattle*..... 666
27. SAME. The mere fact that real estate omitted from assessment was contiguous to the improvement is not sufficient to overcome the presumption that it was omitted because not benefited. *Seattle Mattress & Upholstery Co. v. Seattle*..... 666
28. SAME—IMPROVEMENTS—BENEFIT — OFFSET OF DAMAGES. Damage to abutting property by reason of previous improvements cannot be offset against an assessment for benefits from a later improvement. *Knickerbocker Co. v. Seattle*..... 336
29. SAME—ASSESSMENT—CONCLUSIVENESS — ACTION TO SET ASIDE — COMPLAINT—SUFFICIENCY. Under Rem. & Bal. Code, §§ 7976, 7977, giving the right of appeal from a city assessment for filling tide and swamp lands to any person filing objections before the city council, sitting as a board of equalization, the action of the city council is final as to all persons not objecting, in the absence of fraud or arbitrary action; hence a complaint to set aside an assessment by one who made no objections is insufficient where it alleges merely that the property was not benefited, without alleging any irregularity or any facts showing capricious or arbitrary action. *Martin v. Olympia* ..... 28



## MUNICIPAL CORPORATIONS—CONTINUED.

30. **SAME—ASSESSMENTS—REVIEW—PARTIES ENTITLED—MODIFICATION.** Where the court reduced an assessment against the leasehold and charged part against the fee, the lessee cannot complain that the court had no power to originate an assessment against the fee, the owner of the fee not complaining, and Rem. & Bal. Code, § 7551, providing that the court on appeal may correct or modify the assessment. *Seattle Mattress & Upholstery Co. v. Seattle*..... 666
31. **SAME—REASSESSMENT—INVALIDITY OF ORIGINAL ASSESSMENT.** Under Rem. & Bal. Code, § 7894, providing for reassessments where the invalidity of the original assessment is established "either directly or by virtue of any decision of the courts," a reassessment is *prima facie* authorized where a portion of the lots, found by the jury to be damaged, were adjudged nonassessable for that reason, and the city council by resolution cancelled the same and other like assessments for the same reason. *Hapgood v. Seattle*..... 497
32. **SAME—REASSESSMENT—PROPERTY LIABLE.** The fact that property has been assessed for an improvement, does not prevent a reassessment for an additional charge to make up a deficit arising when part of the assessments were held invalid, such reassessment being expressly authorized by Rem. & Bal. Code, § 7893, to the extent of the benefit which the property received from the improvements. *Hapgood v. Seattle* ..... 497
33. **SAME—REASSESSMENTS—ASSESSMENT OF EXEMPT PROPERTY.** The fact that property which is exempt because not benefited was included in the original assessment, thereby creating a deficiency, does not affect the power to levy a reassessment on other property to make up the deficiency. *Inner-Circle Property Co. v. Seattle*. 508
34. **SAME—REASSESSMENTS—WHEN AUTHORIZED—DEFICIENCY.** A reassessment to make up a deficiency is authorized where the city council cancelled the original assessment against property which had been adjudged to be damaged and therefore not assessable. *Inner-Circle Property Co. v. Seattle*..... 508
35. **SAME—REASSESSMENTS—APPORTIONMENT.** Upon a reassessment, the question of the benefits and the apportionment thereof is an original question in no way controlled by the original assessment. *Inner-Circle Property Co. v. Seattle*..... 508
36. **SAME—REASSESSMENTS—PROPERTY DAMAGED.** Where assessments were adjudged illegal for the reason that the property was found by the jury to be damaged and was therefore nonassessable, such property cannot be subjected to a reassessment, although it may in fact have been benefited, the former adjudication being final. *Hapgood v. Seattle* ..... 497
37. **SAME—REASSESSMENTS—PROPERTY DAMAGED.** An award of damages to a leasehold interest in state lands being an adjudication



MUNICIPAL CORPORATIONS—CONTINUED.

that the property was not benefited, exempts the same from a reassessment levied to make up a deficiency in the original assessment. *Inner-Circle Property Co. v. Seattle*..... 508

38. SAME — REASSESSMENTS — CONFIRMATION — EFFECT — BURDEN OF PROOF ON APPEAL. Where a city council has made a reassessment and the same has been confirmed, upon appeal to the superior court the burden is upon the appellants to show want of authority on the part of the council to make the reassessment, in view of Rem. & Bal. Code, § 7898, which provides that the decision of the city council on confirmation shall be a final determination of the regularity and validity of the reassessment; the presumption being that the council had authority to make the reassessment by reason of a deficiency in, or the invalidity of, the original assessment. *Inner-Circle Property Co. v. Seattle*..... 508

39. MUNICIPAL CORPORATIONS—CONSTRUCTION OF DRAIN—LIABILITY OF CONTRACTOR—FLOODING BY SURFACE WATER. A city contractor making a fill in a street is not liable for the damages caused by water backing up in a depression and entering the plaintiff's cellar, where it appears that a box drain had been put in under the supervision of the city engineer to carry off the water, which was large enough to carry off the water ordinarily, but had become clogged up on one occasion, and there was no evidence of negligence or knowledge on the part of the contractor or city that the drain was insufficient or had become clogged or dammed up. *Quinn v. Peterson & Co.*... 207

40. MUNICIPAL CORPORATIONS — SEWERS — DEFECTIVE CONSTRUCTION— NEGLIGENCE—EVIDENCE—SUFFICIENCY. A *prima facie* case of negligence in the construction of a sewer, rendering the city liable for resulting damage to property, is made out, where it appears that an ordinary eight-inch tile sewer pipe 174 feet long with a drop of 90 feet was installed to convey all sewage from an upper fifteen-inch pipe of more than three times the capacity of the smaller pipe, which would subject the pipe to immense pressure in case of stoppage, that on a previous occasion an eight-inch pipe burst in the same location, after which the city put in the eight-inch pipe in question under similar conditions, which again went out in practically the same place, carrying earth and a bulkhead with it. *Lennon v. Seattle* ..... 447

41. MUNICIPAL CORPORATIONS—INDEBTEDNESS—BONDS—SUBMISSION TO VOTERS—SEPARATE PURPOSES. The submission to the electors of a bond issue for municipal purposes is not illegal as combining several distinct and unrelated objects or purposes, which must be submitted separately, where the two purposes of the bonds was to provide funds for the purchase of existing street railways, or, in the alternative, for the construction of parallel lines, in the discretion of the municipal officers; since they are but two naturally

**MUNICIPAL CORPORATIONS—CONTINUED.**

- related parts of the single purpose of acquiring a municipal street railway. *Tulloch v. Seattle*..... 178
42. **MUNICIPAL CORPORATIONS—CLAIMS—FILING—BREACH OF CONTRACT.**  
 Seattle Charter, art. 4, § 29, providing that all claims for damages against the city must be presented to the city council and filed with the city clerk within thirty days after the time when such claim for damages accrues, all such claims to accurately locate and describe the defect that caused the injury, applies to actions for damages arising *ex contractu* as well as *ex delicto*, and bars an action for damages by a contractor for expense incurred and loss of profits through breach of contract, where no claim therefor was filed within the time limit. *International Contract Co. v. Seattle* ..... 390

**NAMES:**

Order of railroad commission to designate name of station, see RAILROADS, 1.

**NAVIGABLE WATERS:**

Extending boundaries of city to middle of, see MUNICIPAL CORPORATIONS, 1, 2.

**NECESSITY:**

For condemnation, see EMINENT DOMAIN, 2, 12.  
 Segregation of accounts by contractor against each property, see MECHANICS' LIENS, 1.  
 For duplicate statement to owner of material furnished contractor, see MECHANICS' LIENS, 3.  
 For public improvement, discretion of council, see MUNICIPAL CORPORATIONS, 10.  
 Corroboration of female in prosecution for rape, see RAPE, 3.

**NEGLIGENCE:**

See HIGHWAYS, 2, 3.  
 Liability of abstractor for, see ABSTRACTS OF TITLE.  
 Of carriers in shipment of goods, see CARRIERS, 1.  
 Of carrier in injuring person on track, see CARRIERS, 2-4.  
 Measure of damages, see DAMAGES, 4-9.  
 Of employers, see MASTER AND SERVANT.  
 Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 9-14.  
 Of city in constructing sewer, see MUNICIPAL CORPORATIONS, 40.  
 Malpractice, see PHYSICIANS AND SURGEONS, 2.  
 Construction of highway bridge over railroad, see RAILROADS, 3, 4.  
 Of person injured by operation of railroad, see RAILROADS, 7.

## NEGLIGENCE—CONTINUED.

1. NEGLIGENCE—DANGEROUS PREMISES—AMUSEMENT PARK—LIABILITY OF OWNERS—NEGLIGENCE OF LESSEES. The owner of an amusement park impliedly represents that advertised instrumentalities for amusement are reasonably safe, and cannot avoid liability for injury received through the unsafe condition of a mallet, used in connection with a striking machine, by the fact that the machine was operated by a lessee of space under an independent contract; since the lessee would be the agent of the owner. *Wodnik v. Luna Park Amusement Co.* ..... 638
2. NEGLIGENCE—THINGS ATTRACTIVE TO CHILDREN—MUNICIPAL CORPORATIONS—STREETS—LIABILITY. The fact that a street was safe for ordinary use does not release a city from liability for a condition dangerous to children of tender years attracted to the place through work negligently carried on by the city. *Haynes v. Seattle*.... 419
3. SAME. It is negligence for a city in stringing wires on poles in front of the playgrounds of a public school to unwind a coil of wire without guard or watch of any kind where children of tender years would be attracted to the danger. *Haynes v. Seattle*.... 419
4. SAME—UNSAFE APPLIANCES—NEGLIGENCE—EVIDENCE—RES IPSA LOQUITUR. Negligence is established, on the doctrine of *res ipsa loquitur*, where the head of a mallet, used in connection with a striking machine in an amusement park, flew off when an attempt was made to use it for the purpose for which it was furnished, the burden of explanation being cast on the defendant. *Wodnik v. Luna Park Amusement Co.*..... 638
5. NEGLIGENCE—LIABILITIES—CONCURRENT ACTS. Where the concurrent negligence of two persons combined results in an injury to a third person, he may recover from either or both of them. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12
6. SAME—ASSUMPTION OF RISKS—INSPECTION. A patron in an amusement park does not assume the risk from an unsafe mallet which he is invited to use in connection with a striking machine, where there was no defect so patent that he ought to have observed it without inspection, the duty of inspection resting upon the owners of the park. *Wodnik v. Luna Park Amusement Co.*..... 638
7. SAME—CONTRIBUTORY NEGLIGENCE. In such a case he is not guilty of contributory negligence in taking hold of the mallet handle near the upper end, where he had no reason to assume that the head would fly off, and there was no evidence that he was not using it as it was intended to be used. *Wodnik v. Luna Park Amusement Co.* ..... 638

## NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

**NEW TRIAL:**

Appealability of order granting new trial, see **APPEAL AND ERROR**, 2.

1. **NEW TRIAL—GROUNDS.** Where it is not an abuse of discretion to refuse a continuance on account of the absence of a party, it is not an abuse of discretion to refuse a new trial asked on the same grounds; the showing of a meritorious defense not being alone sufficient. *Nye v. Manley*..... 631
2. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—IMPEACHING EVIDENCE.** A new trial for newly discovered evidence is properly refused where the new evidence is merely impeaching and could or should have had but small probative value, and should not have changed the result. *State v. Kincaid*..... 273

**NONSUIT:**

On trial, see **TRIAL**, 1.

**NOTARIES:**

Administration of oath, see **PERJURY**.

**NOTES:**

Promissory notes, see **BILLS AND NOTES**.

**NOTICE:**

- Of appeal, see **APPEAL AND ERROR**, 7.
- Of defect in title, see **BILLS AND NOTES**, 4.
- To authorize discharge of guardian, see **INSANE PERSONS**, 2.
- Vacation of judgment, see **JUDGMENT**, 1.
- Of fraud, see **MONEY RECEIVED**.
- Of local assessment, see **MUNICIPAL CORPORATIONS**, 21.
- Claims against city for damages, see **MUNICIPAL CORPORATIONS**, 42.
- To surety company of default by contractor, see **PRINCIPAL AND SURETY**, 1, 3.
- Of action, see **PROCESS**.
- Tax sale, see **TAXATION**, 3.
- Of election to rescind contracts, see **VENDOR AND PURCHASER**, 2.
- Purchaser of real property, see **VENDOR AND PURCHASER**, 4.
- Application for change of venue, see **VENUE**.

**NUNCUPATIVE WILLS:**

See **WILLS**, 1.

**OATH:**

- False swearing in registration oath, see **ELECTIONS**, 5-7.
- False oath, see **PERJURY**.

**OBJECTIONS:**

Necessity for purpose of review, see **APPEAL AND ERROR**, 3.

Waiver on appeal, see **APPEAL AND ERROR**, 13.

To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 29, 30.

**OBSTRUCTIONS:**

Of water course, see **WATERS AND WATER COURSES**, 2-7.

**OFFICERS:**

Violation of election laws, see **ELECTIONS**, 4.

Mandamus affecting, see **MANDAMUS**.

Municipal officers, see **MUNICIPAL CORPORATIONS**, 4, 7-9.

Quo warranto, see **QUO WARRANTO**.

School officers, power to dissolve consolidated district, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.

**ORAL CONTRACTS:**

See **FRAUDS, STATUTE OF**.

**ORDERS:**

Review of, see **APPEAL AND ERROR**, 2, 16.

Mandamus to test validity of order consolidating school districts, see **MANDAMUS**.

Of railroad commission, see **RAILROADS**, 1, 2.

**ORDINANCES:**

Municipal ordinances, see **MUNICIPAL CORPORATIONS**, 9, 13, 19.

**ORIGINAL UNDERTAKING:**

See **FRAUDS, STATUTE OF**, 1, 2.

**PAROL CONTRACTS:**

See **FRAUDS, STATUTE OF**.

**PAROL EVIDENCE:**

In civil actions, see **EVIDENCE**.

**PARTIES:**

See **QUO WARRANTO**.

Death ground for abatement, see **ABATEMENT AND REVIVAL**.

Entitled to allege error, see **APPEAL AND ERROR**, 12; **MUNICIPAL CORPORATIONS**, 30.

Condemnation proceedings, see **EMINENT DOMAIN**, 9.

Persons concluded by judgment, see **JUDGMENT**, 3, 5, 7.

Persons entitled to mechanics' lien, see **MECHANICS' LIENS**.

Persons entitled to redeem from mortgage foreclosure sale, see **MORTGAGES**, 2.

Absence of party ground for new trial, see **NEW TRIAL**, 1.

**PARTNERSHIP:**

1. **PARTNERSHIP—CONTRACT—CONSTRUCTION — JOINT ADVENTURES.** A partnership is created by an agreement between two persons to enter into the business of dealing in tax titles, whereby one was to conduct the business and the other was to furnish what money he deemed advisable, to hold the title, and to receive back his advances and interest, before even division of the balance as profits; especially where the parties in a subsequent written agreement refer to the relation as a copartnership. *Oriental Realty Co. v. Taylor*. 115
2. **PARTNERSHIP—EXISTENCE—ADVANCES FOR SHARE OF PROFITS—EVIDENCE—SUFFICIENCY.** A partnership is not shown where it merely appears that one agreed to advance the cost of operating a business belonging to another, in consideration of one-half of the net profits, if any, the advances to be returned in any event. *Klain v. Kaufman* ..... 35

**PAYMENT:**

Acceptance of note as extending time for payment of debt, see **BILLS AND NOTES**, 1.

Promise to pay mortgage debt, see **CHATTEL MORTGAGES**, 1.

Of filing fees under primary election law, see **ELECTIONS**, 2.

Nonpayment of insurance premium, see **INSURANCE**, 6.

Price of goods sold, see **SALES**, 5, 6.

Retention of installments paid, on breach by vendee, see **SALES**, 4, 7, 8.

1. **PAYMENT—BY NOTE OF THIRD PARTY—MISTAKE.** The acceptance of a note from one company, for shingles sold to another company, under a misunderstanding of the fact that there were two companies with practically the same name, does not constitute a payment of the debt, or show that the debt was in fact the debt of the maker of the note, where the other company had ordered the shingles and the note was returned on discovery of the mistake; the legal effect of payment by note depending on the intention of the parties. *Carlson Brothers Co. v. Weidauer & Lansdown Shingle Co.*.... 161

**PENALTIES:**

Under contracts, see **DAMAGES**, 2.

On breach of contract, see **SALES**, 7, 8.

**PERFORMANCE:**

Of contract entitling contractor to lien, see **MECHANICS' LIENS**, 2.

Delay in performance of contract, see **SALES**, 1, 2.

**PERJURY:**

1. **PERJURY—FALSE OATH—ADMINISTRATION—AUTHORITY OF NOTARY.** Under Rem. & Bal. Code, § 8298, authorizing a notary public to take depositions and affidavits and administer all oaths required by law to be administered, a notary cannot, unless it is required by law,

**PERJURY—CONTINUED.**

administer an oath with such binding force as is necessary to support a charge of perjury, in case of a false sworn statement. *State v. Dallagiovanna* ..... 84

2. **PERJURY—FALSE OATH—POWER AND JURISDICTION OF TRIBUNAL—INVESTIGATING COMMITTEE.** Since perjury can only be predicated on a false oath in a proceeding of which the tribunal had jurisdiction, an indictment is insufficient where its basis is a false oath before a committee authorized by resolution of a city council "to investigate and probe charges made by the acting mayor," without showing against whom the charges were made or that the matter was within the council or its jurisdiction. *State v. Dallagiovanna*..... 84

**PERSONAL INJURIES:**

See NEGLIGENCE.

To person on street car track, see CARRIERS, 2-4.

Damages for, see DAMAGES, 4-9.

To traveler on highway, see HIGHWAYS, 2, 3.

To employee, see MASTER AND SERVANT.

To person on or near railroad tracks, see RAILROADS, 3-7.

**PETITION:**

For consolidation of school districts, see SCHOOLS AND SCHOOL DISTRICTS, 1.

**PHYSICIANS AND SURGEONS:**

1. **PHYSICIANS AND SURGEONS—SERVICES—CONTRACT.** Upon a general contract of hire to furnish such medical and surgical treatment for an employee as the physician may find necessary, a second operation is within the contract, if it was necessary for the recovery of the patient. *Hood v. Gerrick*..... 607
2. **PHYSICIANS AND SURGEONS—MALPRACTICE—EVIDENCE — SUFFICIENCY.** In an action for malpractice in failing to properly diagnose a case and treating an injury to the sciatic nerve of a child as typhoid fever, a judgment of dismissal, notwithstanding a verdict for the plaintiff, is proper, where it appears from all the evidence that there was no injury to the sciatic nerve but that the child was suffering from infantile paralysis, which was incurable, that the treatment for typhoid fever did not contribute to the present condition of the child, and that the defendant, as a man of ordinary skill in the medical profession, could at first have diagnosed the case as typhoid fever, multiple neuritis, or infantile paralysis. *Brydges v. Cunningham* ..... 8

**PLEA:**

Of insanity in criminal prosecution, see CRIMINAL LAW, 8.

**PLEADING:**

Continuance on account of trial amendment, see **CONTINUANCE**, 2.  
 Alleging conditions precedent in complaint by corporation, see **CORPORATIONS**, 4.

In action to vacate receivership, see **CORPORATIONS**, 5.

Condemnation proceedings, see **EMINENT DOMAIN**, 5.

In action for injury to traveler on highway, see **HIGHWAYS**, 2.

Indictment or criminal information or complaint, see **INDICTMENT AND INFORMATION**.

On insurance policy, see **INSURANCE**, 8, 9.

Complaint for personal injuries, sufficiency, see **MASTER AND SERVANT**, 10, 15.

In action to set aside assessment, see **MUNICIPAL CORPORATIONS**, 29.

Necessity for pleading foreign laws, see **STATUTES**, 5.

1. **PLEADING—COMPLAINT—CONCLUSIONS.** In an action to set aside a local assessment, allegations in the complaint that plaintiff's property was taken without due process of law, or any authority and that the assessment was for a private use, and contrary to law, are mere conclusions of law presenting no issuable facts. *Martin v. Olympia* ..... 28
2. **PLEADING—INCONSISTENT PLEADINGS—CORRECTION.** Where it is manifest from the whole record that the defendant only desired to have an offset, which had been inconsistently pleaded as a counterclaim in a cross-complaint, defendant should be allowed to correct the pleading by dismissing the cross-complaint. *Miller v. Commercial Union Assurance Co.* ..... 529
3. **PLEADING—DENIAL ON INFORMATION—MATTERS OF RECORD.** A denial on information and belief that a mechanics' lien notice had been filed and recorded is insufficient to raise any issue thereon. *Belknap Glass Co. v. Brown* ..... 127

**POLICY:**

Of insurance, see **INSURANCE**.

**POLITICAL RIGHTS:**

Forfeiture of, see **ELECTIONS**, 6.

**POSSESSION:**

Character of to establish title, see **ADVERSE POSSESSION**, 2.

**POWERS:**

Of railway company to condemn property, see **EMINENT DOMAIN**, 4.

Of city to construct bridge, see **MUNICIPAL CORPORATIONS**, 11.

To levy assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 14.

Of county superintendent to dissolve consolidated district, see **SCHOOLS AND SCHOOL DISTRICTS**, 2.



**PRACTICE:**

See APPEAL AND ERROR; CONTINUANCE; CRIMINAL LAW; DAMAGES;  
JUDGMENT; NEW TRIAL; TRIAL.

Condemnation proceedings, see EMINENT DOMAIN, 2, 12, 13.

**PRECINCTS:**

Establishment of, see ELECTIONS, 3.

**PREJUDICE:**

Ground for reversal in civil actions, see APPEAL AND ERROR, 20-24.

Affidavit of prejudice, see VENUE.

**PREMIUMS:**

Forfeiture for nonpayment of, see INSURANCE, 6.

**PREMISES:**

Dangerous premises, see NEGLIGENCE, 1.

**PRESCRIPTION:**

Establishment of highways, see HIGHWAYS, 1.

**PRESUMPTIONS:**

Regularity of order discharging guardian, see JUDGMENT, 1.

As to notice of local assessment, see MUNICIPAL CORPORATIONS, 21.

As to benefits from improvement, see MUNICIPAL CORPORATIONS,  
26, 27.

Authority of council to make reassessment, see MUNICIPAL COR-  
PORATIONS, 38.

As to legal acquirement of real estate held by bank, see TAXATION, 2.

As to regularity of tax proceedings, see TAXATION, 4.

As to intent of testator, see WILLS, 2.

**PRIMARY ELECTIONS:**

See ELECTIONS, 1, 2, 4.

**PRINCIPAL AND AGENT:**

See BROKERS.

Assignment of agency interest in property, see ASSIGNMENTS.

Insurance agents, see INSURANCE, 1, 7.

Authority of agent to waive conditions in indemnity bond, see  
PRINCIPAL AND SURETY, 2.

Agency with interest, see TRUSTS, 1.

1. PRINCIPAL AND AGENT—PERSONAL LIABILITY OF AGENT—BREACH OF COVENANTS—SALES—TITLE—MISREPRESENTATIONS. The covenants of warranty of title in a bill of sale signed by the defendant as agent do not render him liable for misrepresenting the title, which failed, where he had authority to make the sale and believed that his principal had good title, and made no representations relating to the title other than those contained in the bill of sale, which were the covenants of the principal. *Hillis Logging Co. v. Mescher*.. 454

**PRINCIPAL AND SURETY:**

See **BAIL**.

1. **PRINCIPAL AND SURETY—BONDS—BUILDING CONTRACT—CONDITIONS—WAIVER.** Stipulations in a surety bond guaranteeing a building contract that the owner should give immediate notice in writing to the president of the surety company at its principal office of any defaults by the contractor in the performance of the work, and that the owner should retain a certain percentage of the amounts due the contractor, are modified and waived, where, upon the contractor's inability to pay the materialmen out of estimates certified by the architect, it was agreed that the owners should pay all claims approved by the surety company, and this was done on the written approval of the company's resident attorney in fact, he having authority to represent the surety company. *Parsons v. Pacific Surety Co.* ..... 595
2. **SAME—WAIVER BY AGENT—AUTHORITY.** It sufficiently appears that a resident attorney in fact for a surety company had authority to waive conditions in an indemnity bond, where he was its accredited representative in that city and executed the bond in the name of the company, and his general authority was not questioned except by mere denials in the pleadings, no evidence being offered thereon by the defendant. *Parsons v. Pacific Surety Co.*..... 595
3. **SAME—CONTRACTOR'S BOND—LIABILITY—DEMURRAGE CHARGES—CONDITIONS.** Failure to promptly notify a surety company of defaults by a contractor in the performance of a building contract, as required by stipulations in the bond, relieves the surety company from liability for demurrage charges on failure to complete the building on time. *Parsons v. Pacific Surety Co.*..... 595

**PRIVILEGE:**

Privileged communications, see **LIBEL AND SLANDER**, 1.

**PROBATE:**

Of will, see **WILLS**, 1.

**PROCESS:**

See **DIVORCE**, 2.

On appeal, see **APPEAL AND ERROR**, 7.

1. **PROCESS—SUMMONS BY PUBLICATION—FORM—SUBSTANTIAL COMPLIANCE.** A summons for publication requiring the defendant to appear within sixty days after a specified date, is substantially in the form prescribed by Bal. Code, § 4878, which requires appearance to be within "sixty days after the date of the first publication of this summons, to-wit, within sixty days after.....day of.....;" the omission of reference to the first publication being immaterial where the date thereof itself is given. *Old Republic Mining Co. v. Ferry County* ..... 600

**PROCESS—CONTINUED.**

2. **SAME—NOTICE—PROOF.** Proof that a notice of a tax sale was duly given as required by law may be shown by recitals in the county treasurer's return of the sale. *Old Republic Mining Co. v. Ferry County* ..... 600

**PROMISE:**

- To pay mortgage debt, see **CHATTEL MORTGAGES**, 1.  
Original promise, see **FRAUDS, STATUTE OF**, 1, 2.  
To make appliance safe, see **MASTER AND SERVANT**, 7, 8.  
To give property in consideration of personal services, see **WORK AND LABOR**.

**PROMISSORY NOTES:**

- See **BILLS AND NOTES**.

**PROOF:**

- Of loss insured against, see **INSURANCE**, 4.  
Of service of process, see **PROCESS**, 2.  
Of nuncupative will, see **WILLS**, 1.

**PROPERTY:**

- Adverse possession, see **ADVERSE POSSESSION**.  
Property assignable, see **ASSIGNMENTS**.  
Fraudulent conveyance of, see **ATTACHMENT**.  
Mortgage of personal property, see **CHATTEL MORTGAGES**, 1.  
Award and division in divorce proceedings, see **DIVORCE**, 4-6.  
Taking or damaging for public use, see **EMINENT DOMAIN**.  
Separate or community nature of, see **HUSBAND AND WIFE**.  
Liquor license as property subject to descent, see **INTOXICATING LIQUORS**, 2.  
Assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 14-38.  
Taxation of, see **TAXATION**.  
Devised by will, see **WILLS**.

**PROVINCE OF COURT AND JURY:**

- In civil actions, see **TRIAL**, 1.

**PROXIMATE CAUSE:**

- Of injury to servant, see **MASTER AND SERVANT**, 4.  
Of accident, see **RAILROADS**, 5.

**PUBLICATION:**

- Service of process, see **PROCESS**.

**PUBLIC DEBT:**

- Submission of bond issue to vote, see **MUNICIPAL CORPORATIONS**, 41.

**PUBLIC IMPROVEMENTS:**

- By municipalities, see **MUNICIPAL CORPORATIONS**.

**PUBLIC LANDS:**

Public improvement by filling tide lands, see MUNICIPAL CORPORATIONS, 13, 17, 29.

Constructive trust on sale of state lands, see TRUSTS, 2.

Appropriation of water rights, see WATERS AND WATER COURSES, 1, 2.

1. PUBLIC LANDS—DECISIONS OF DEPARTMENT—CONCLUSIVENESS—HOMESTEAD ENTRY—UNSURVEYED LANDS—MISTAKE. Under the rule that decisions of the land department upon questions of fact are conclusive, and that courts of equity will relieve only against fraud or mistake or erroneous conclusions of law, the decision of the land department that a settler on unsurveyed public lands was acting in good faith and constructively in possession of the tract upon which he supposed his dwelling to be located is conclusive and controlling, where there is no contention of fraud or mistake, his notice was posted on the tract, he acted in good faith, and the contesting railroad company sustained no actual loss other than it would have sustained had the land upon which the improvements were actually located been awarded to the settler. *Great Northern R. Co. v. Hower*..... 380

**PUBLIC SCHOOLS:**

See SCHOOLS AND SCHOOL DISTRICTS.

**PUBLIC USE:**

Taking property for public use, see EMINENT DOMAIN.

**PUPILS:**

Compulsory attendance at public school, see SCHOOLS AND SCHOOL DISTRICTS, 4, 5.

**QUESTION FOR JURY:**

Negligence in colliding with vehicle on highway, see HIGHWAYS, 3.

In action for injury to servant, see MASTER AND SERVANT, 3, 7-9, 11, 12.

Contributory negligence of person injured, see RAILROADS, 7.

**QUIETING TITLE:**

1. QUIETING TITLE—TITLE OF PLAINTIFF. In a suit to quiet title, the plaintiff must prevail, if at all, on the strength of her own title. *Brown v. Bremerton*..... 474

**QUO WARRANTO:**

To regain title to city office, see MUNICIPAL CORPORATIONS, 8.

1. QUO WARRANTO—WHEN LIES—WHO ARE "OFFICERS." *Quo warranto* lies in favor of a foreman of construction work, even if he is not an "officer" as defined by the common law, where the city charter adopts the merit system and applies it to all employees placed

**QUO WARRANTO—CONTINUED.**

in the civil service list with manifest intent to classify such positions as offices and to have such officers removable only for cause. *State ex rel. Powell v. Fassett*..... 555

2. **QUO WARRANTO—PARTIES—PROPER NECESSARY DEFENDANTS.** In *quo warranto* to oust an illegal appointee of the commissioner of public utilities and to restore the plaintiff to the position and for damages, the commissioner in his official capacity is a proper party defendant; since plaintiff is not required to resort to two actions where one will suffice. *State ex rel. Powell v. Fassett*..... 555

**RAILROAD COMMISSION:**

Orders of affecting railroads, see **RAILROADS**, 1, 2.

**RAILROADS:**

Appearance by railroad attorney for city in condemnation proceeding, see **ATTORNEY AND CLIENT**.

Carriage of goods and passengers, see **CARRIERS**, 1.

Appropriation of property, see **EMINENT DOMAIN**, 4, 5.

As employers, see **MASTER AND SERVANT**, 15.

Liability for diversion of surface waters, see **WATERS AND WATER COURSES**, 8.

1. **RAILROADS — REGULATION—NAME OF STATIONS — RAILROAD COMMISSION.** An order of the railroad commission requiring a railroad to designate the name of a station in its tariffs, folders, and tickets as Bingen and White Salmon is unreasonable, where it appears that its station, in the village of Bingen of 100 inhabitants, is but one and one-half miles from the business center of the town of White Salmon, having a population of 800 or more, the latter being the more appropriate name for the district, and the railroad company having recently changed the name of its station from Bingen to White Salmon in deference to the wishes of a majority of the patrons of the station; since the naming of its stations will not be interfered with in the absence of any public necessity therefor. *State ex rel. Spokane, Portland and Seattle R. Co. v. Railroad Commission* ..... 523
2. **RAILROADS—REGULATION—SPUR TRACKS—ORDER OF RAILROAD COMMISSION—REVIEW.** A railroad company is bound by an order of the railroad commission ordering the construction and maintenance of a spur track to serve a warehouse, and cannot have the same reviewed on certiorari on the theory that the order was a continuing one, where the company complied with the order by building the spur at the shipper's expense, which was paid, and took no appeal; Laws 1911, p. 597, § 87, providing that on appeal the superior court may in its discretion restrain or suspend the order *pendente lite*. *Great Northern R. Co. v. Public Service Commission*..... 579

## RAILROADS—CONTINUED.

3. RAILROADS—INJURY TO TRAVELERS—OVERHEAD BRIDGE—NEGLIGENCE—CONSTRUCTION—EVIDENCE—SUFFICIENCY. In an action against a railroad company for injuries sustained by reason of an alleged defective overhead highway bridge, the fact that the defendant constructed the bridge is *prima facie* established by its admission of ownership of the track and roadbed and the fact that it accepted a city franchise requiring it to construct and forever maintain a suitable highway bridge over its tracks at that point. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12
4. SAME. A jury is warranted in finding negligent construction of a highway bridge over railroad tracks as a contributing cause of the running away of a team, which became frightened by smoke and steam coming up through the floor of the bridge, where it appears that the bridge had a single floor with cracks one-half to one and one-half inches in width, and a carpenter testified that the usual method of constructing such a bridge is to lay a double floor, the first floor laid diagonally and the second at right angles. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12
5. SAME—NEGLIGENT CONSTRUCTION—EXCESSIVE SPEED—PROXIMATE CAUSES OF ACCIDENT—EVIDENCE—SUFFICIENCY. Where a team took fright and ran away on a highway bridge over railroad tracks, when a train passed under at an excessive speed, and smoke and steam came up through wide cracks in the floor of the bridge, the jury is warranted in finding that the excessive speed and the smoke under the team were the proximate causes of the fright, and a verdict thereon is not open to the objection that it was based on speculation or conjecture. *Jones v. Spokane, Portland & Seattle R. Co.* ..... 12
6. SAME—CONTRIBUTING CAUSES—EXCESSIVE SPEED—EVIDENCE—SUFFICIENCY. Where it was not usual or customary to operate a train at excessive speed, under a highway bridge in a thickly inhabited part of the city, and there was evidence that smoke and steam came up through the cracks in the floor and frightened a team, there is sufficient evidence that negligent operation of the train contributed to the fright, where it appears that the driver could not see the track when he drove on the bridge nor until about fifty feet from a point directly over the track, the approach being on a down grade of eight per cent, that he did not see or hear the train until at the bridge, no bell was rung or whistle sounded, and the train was traveling at forty-five miles per hour. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12
7. RAILROADS—INJURY TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In such a case, the driver's contributory negligence is for the jury, where he could not see the train until within fifty feet of the tracks, when he could see the track for half a mile, but the train was upon him, and he testified that before driving on

**RAILROADS—CONTINUED.**

the bridge he listened for it but could not hear it. *Jones v. Spokane, Portland & Seattle R. Co.*..... 12

**RAPE:**

1. **RAPE—EVIDENCE—SUFFICIENCY.** Under Rem. & Bal. Code, § 2437, providing that sexual penetration, however slight, is sufficient to complete sexual intercourse, evidence of repeated attempts by the accused and pain suffered by a child of twelve, is sufficient to make a case for the jury upon the question of consummation of a statutory rape. *State v. Kincaid*..... 273
2. **RAPE—EVIDENCE—SUFFICIENCY.** There is no corroboration of the prosecuting witness as to the use of force to overcome her resistance where there were no eyewitnesses, no one heard her outcry, if she made any, she made no complaint for some time, her clothing was not torn and she was not injured, it not being sufficient to merely prove opportunity and recent penetration. *State v. Raymond*... 98
3. **RAPE—EVIDENCE—CORROBORATION—NECESSITY.** Under Rem. & Bal. Code, § 2443, providing that no conviction of rape shall be had upon the testimony of the female against whom the crime was committed unless supported by other evidence, corroboration of her testimony as to the use of force to overcome her resistance is essential where force is an element of the offense under Id., § 2435. *State v. Raymond* ..... 98

**RATE:**

Of interest, see **INTEREST**.

**REAL ESTATE AGENTS:**

See **BROKERS**.

**REAL PROPERTY:**

Jurisdiction of court, see **DIVORCE**, 4.

Oral agreement to convey community interest in, see **FRAUDS, STATUTE OF**, 4.

Assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 14-38.

Deduction of from assessed value of capital stock of bank, see **TAXATION**, 1, 2.

**REASSESSMENT:**

For public improvement, see **MUNICIPAL CORPORATIONS**, 31-38.

**RECEIVERS:**

See **CORPORATIONS**, 5.

1. **RECEIVERS — ACTIONS—CONDITIONS PRECEDENT — LEAVE TO SUE—WAIVER.** The objection that leave of court to sue a receiver was not first obtained is waived if not raised by the receiver upon filing a general appearance, and cannot thereafter be raised by other parties. *Goodale Phonograph Co. v. Valentine*..... 263

**RECEIVING STOLEN GOODS:**

1. **RECEIVING STOLEN GOODS—EVIDENCE—SUFFICIENCY.** A conviction of larceny by receiving stolen goods is sustained where it appears that the accused received ostrich plumes which he knew had been stolen and sold them with intent to deprive the owner thereof. *State v. Rubenstein*..... 38
2. **SAME—INSTRUCTIONS.** In a prosecution for larceny by receiving and disposing of stolen goods, it is error to instruct upon the subject of defendant's knowledge respecting the theft, that knowledge of any particular fact may be inferred from the knowledge of such other facts as would put an ordinary prudent man upon inquiry, and that the state must prove beyond a reasonable doubt either that defendant had actual knowledge that the goods were stolen or was in possession of facts that would put an ordinary prudent man on inquiry; since it compelled the jury to infer the fact of knowledge instead of leaving the inference to be drawn by the jury. *State v. Rubenstein* ..... 33

**RECORDS:**

On appeal, see **APPEAL AND ERROR**, 8.

Conclusiveness of on appeal, see **CRIMINAL LAW**, 9.

Record of contract for sale of lands as notice to intending purchasers, see **VENDOR AND PURCHASER**, 4.

**REDEMPTION:**

From mortgage, see **MORTGAGES**, 2.

**REFERENCE:**

Order of to settle statement of facts, see **APPEAL AND ERROR**, 8.

**REGISTRATION:**

Of voters, see **ELECTIONS**, 5-7.

**REGULATION:**

Of transportation facilities by railroad commission, see **RAILROADS**, 1, 2.

**RELIANCE:**

On promise to make appliance safe, see **MASTER AND SERVANT**, 8.

**REMAND:**

Of cause on appeal or writ of error, see **APPEAL AND ERROR**, 25.

**REMOVAL OF CAUSES:**

Change of venue or place of trial, see **VENUE**.

**RENEWAL:**

Of lease, see **LANDLORD AND TENANT**, 1.



**RENT:**

See LANDLORD AND TENANT, 3, 4.

**RESCISSION:**

Cancellation of written instrument, see CANCELLATION OF INSTRUMENTS.

Of sale of corporate stock, see CORPORATIONS, 2, 3.

Of contract of sale, see SALES, 6.

Of contract for sale of land, see VENDOR AND PURCHASER, 1-3.

**RESERVATION:**

In deeds, see DEEDS, 1, 2.

**RES GESTAE:**

In criminal prosecutions, see CRIMINAL LAW, 4.

**RES IPSA LOQUITUR:**

See NEGLIGENCE, 4.

**RES JUDICATA:**

See JUDGMENT, 5-7.

**REVENUE:**

See TAXATION.

**REVIEW:**

See APPEAL AND ERROR; CERTIORARI.

In criminal prosecution, see CRIMINAL LAW, 7-10.

In condemnation proceedings, see EMINENT DOMAIN, 2, 12, 13.

**RISKS:**

Assumed by employee, see MASTER AND SERVANT, 5-7.

Assumption of by person injured, see NEGLIGENCE, 6.

**ROADS:**

See HIGHWAYS.

**ROBBERY:**

See CRIMINAL LAW, 4, 5, 10.

Charging attempt to commit, see INDICTMENT AND INFORMATION, 1.

1. ROBBERY—EVIDENCE—SUFFICIENCY. A conviction of robbery is not sustained where there was no evidence that the defendant participated in the crime or aided or abetted therein or in a conspiracy to commit it, other than the fact that he joined the others a short time previously and said "get him" when the victim started to run away. *State v. Gamber*..... 66

**SAFE PLACE TO WORK:**

See MASTER AND SERVANT, 1-3, 7, 10.

**SALARY:**

Of city officer, liability for in *quo warranto*, see MUNICIPAL CORPORATIONS, 8.

**SALES:**

Of corporate stock, see CORPORATIONS, 1-3.

Fraud in sale of mining stock, see EQUITY; FRAUD.

Of intoxicating liquors, see INTOXICATING LIQUORS.

By agents, see PRINCIPAL AND AGENT, 1.

Tax sales, see TAXATION, 3-6.

Of realty, see VENDOR AND PURCHASER.

1. **SALES—CONTRACT—BREACH—DELAY IN PERFORMANCE.** Where an order for two tons of turkeys to arrive at Spokane on November 23d was accepted, the seller is bound to ship the same so that the whole lot will arrive at Spokane during business hours on the 23d; and where they were shipped in two lots so that the first lot could not arrive until the night of the 23d, the buyer is justified in rejecting them. *Nelson v. Imperial Trading Co.*..... 442
2. **SAME—WAIVER OF BREACH.** Where two tons of turkeys were ordered to arrive at Spokane on November 23d and they were shipped in two lots so that the first lot could not arrive until the night of the 23d, the buyer did not waive the breach where, upon being notified of the arrival of the first lot, he examined and immediately rejected it, without assigning any special reason. *Nelson v. Imperial Trading Co.* ..... 442
3. **SALES—BREACH BY VENDEE—MEASURE OF DAMAGES.** Where, upon a breach by the buyer of a contract to purchase hogs, the market price went down, and the seller used due diligence and made as advantageous sales of the remainder as the circumstances would permit, both as to the time and the price obtained, the measure of damages is sufficiently fixed by the difference between the contract price and the price obtained, plus his expense in feeding the hogs beyond the time he had agreed to do so; as it is a fair conclusion from his diligence that his loss was no greater than if he had sold at the market price on the day of the breach. *Carver-Shadbolt Co. v. Klein* ..... 586
4. **SALES—CONDITIONAL SALES—BREACH—LIQUIDATED DAMAGES—RETENTION OF PAYMENTS.** Under a conditional sales contract of a pianorchestra, reserving the title until payment of the price and providing that any payment made prior to breach might be retained by the seller as liquidated damages, the seller may retain the installments paid and sue to recover possession on an admitted breach in subsequent payments; and such action being to enforce and not rescind the contract, waiver therein of claims for damages or rent for detention does not affect plaintiff's right to retain payments credited on the contract. *Eilers Music House v. Oriental Co.* ..... 618

## SALES—CONTINUED.

5. **SALES—ACTION FOR PRICE—COUNTERCLAIM—DAMAGES.** A counterclaim for damages by reason of alleged defects in an instrument purchased fails where the purchaser did not rescind, but kept the instrument, and failed to show that he had suffered any loss or damage by reason of the defects. *Eilers Music House v. Oriental Co.* ..... 618
6. **SAME—RESCISSION—RECOVERY OF PRICE.** Money paid on a conditional sales contract can only be recovered by rescinding the contract and returning the property or by proving damages. *Eilers Music House v. Oriental Co.*..... 618
7. **SAME—BREACH—LIQUIDATED DAMAGES OR PENALTY.** Upon a conditional sale of a pianochestra, stipulating that the sums paid may be retained at liquidated damages, if the buyer fails to pay for the instrument, or removes or attempts to remove or sell it, the conditions named are not of such a differing degree of importance that the measure of damages could not be appropriate for each; and hence the stipulation will not be construed as a penalty or security for the damages actually suffered. *Eilers Music House v. Oriental Co.*..... 618
8. **SAME.** A stipulation in a conditional sales contract of a pianochestra that any payments made prior to breach may be retained as liquidated damages, is not to be treated as a penalty because such damages increase as the performance continues; since the vendor's actual damages increase the longer he is kept out of possession and by the increased deterioration of the property. *Eilers Music House v. Oriental Co.*..... 618

## SCHOOLS AND SCHOOL DISTRICTS:

Condemnation of property for play grounds, see EMINENT DOMAIN, 3, 6.

Mandamus to review orders of school superintendent, see MANDAMUS. Subject and title of act relating to schools, see STATUTES, 1.

Appropriation of water rights in school lands, see WATERS AND WATER COURSES, 1.

1. **SCHOOLS AND SCHOOL DISTRICTS—CONSOLIDATION—PETITION—REQUISITES.** Rem. & Bal. Code, § 4440, authorizing the school superintendent to consolidate school districts upon the receipt of a petition signed by "five heads of families of two or more districts," requires only five signatures from the entire territory, and not the signatures of five heads of families from each district. *State ex rel. Harris v. Ward*..... 342
2. **SCHOOLS AND SCHOOL DISTRICTS—SCHOOL SUPERINTENDENTS—POWERS—CONSOLIDATION OF DISTRICTS.** In the absence of statutory authority, the county school superintendent has no power to dissolve a consolidated school district, whether the consolidation was legal or illegal. *Consolidated School District No. 105 v. Jones*..... 537

**SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.**

3. **SCHOOLS AND SCHOOL DISTRICTS—SCHOOL ELECTIONS—VOTE—STATUTES.** Rem. & Bal. Code, § 4664, providing that a school election for the purchase of school grounds shall be by ballot, is directory only, and the election is not invalidated by the fact that a standing vote was taken in the absence of evidence that the election did not fairly represent the will of the electors. *State ex rel. School District No. 56 v. Superior Court*..... 189
4. **SCHOOLS AND SCHOOL DISTRICTS—OFFENSES—COMPULSORY ATTENDANCE—INFORMATION—SUFFICIENCY.** An information for violation of the school law providing for compulsory attendance of children of school age in the public school of the district for the full term, or in a private school for the same term, is not defective in that it charges the neglect to cause the children to attend the public school or an "approved" private school, where the gist of the offense was in the failure to attend any school, public or private, and the information clearly charges such offense. *State v. Counort*..... 361
5. **SAME—DEFENSES—HOME INSTRUCTION.** It is not defense to a prosecution for violating the school law requiring parents to cause their children of school age to attend the public school of the district or a private school, that the parent is experienced and qualified as a teacher and gave private instruction to his own children at his home; such home instruction not being attendance at a private school within the meaning of the law, where he did not maintain a private school at his home as determined by the purpose, intent and character of the endeavor. *State v. Counort*..... 361

**SEARCHES AND SEIZURES:**

Search proceedings as ground for malicious prosecution, see **MALICIOUS PROSECUTION**.

**SEGREGATION:**

Of accounts against each property, see **MECHANICS' LIENS**, 1.

**SEPARATE ESTATE:**

Of married women, see **HUSBAND AND WIFE**, 2, 3.

**SERVICE:**

Of process, see **PROCESS**.

Personal services, see **WORK AND LABOR**.

**SET-OFF AND COUNTERCLAIM:**

Effect of counterclaim as determining amount in controversy, see **APPEAL AND ERROR**, 1.

Offset of benefits against damages, see **EMINENT DOMAIN**, 8; **MUNICIPAL CORPORATIONS**, 28.

Pleading matter of set-off or counterclaim, see **PLEADING**, 2.

In action for price of goods sold, see **SALES**, 5.

**SETTLEMENT:**

Of statement of facts, see **APPEAL AND ERROR**, 8.

**SEWERS:**

Liability of city for defective construction of, see **MUNICIPAL CORPORATIONS**, 40.

**SHIPPING:**

Liability of initial carrier for damage to goods, see **CARRIERS**, 1.

**SLANDER:**

See **LIBEL AND SLANDER**.

**SPECIAL LAWS:**

See **MUNICIPAL CORPORATIONS**, 1.

**SPEED:**

Excessive speed as proximate cause of accident, see **RAILROADS**, 5.

**STATEMENT:**

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 8.

Duplicate statement to owner of material furnished contractor, see **MECHANICS' LIENS**, 3, 4.

**STATES:**

Grant of right to take fish, see **FISH**.

**STATIONS:**

Order of railroad commission to name station, see **RAILROADS**, 1.

**STATUTES:**

Construction of laws relating to elections, see **ELECTIONS**, 1-4, 6.

False registration, see **ELECTIONS**, 5-7.

Providing for compensation to owner, see **EMINENT DOMAIN**, 6.

Statute of frauds, see **FRAUDS, STATUTE OF**.

Charging offense in language of statute, see **INDICTMENT AND INFORMATION**, 1.

Construction of laws relating to sales of liquor, see **INTOXICATING LIQUORS**, 1.

Of limitation, see **LIMITATION OF ACTIONS**.

Extending boundaries of cities, see **MUNICIPAL CORPORATIONS**, 2.

Requiring bonds from contractors on public work, see **MUNICIPAL CORPORATIONS**, 5, 6.

Limit of assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 22.

Mode of voting at school election, see **SCHOOLS AND SCHOOL DISTRICTS**, 3.

Granting right to city to use beds and shores of lakes to high water mark, see **WATERS AND WATER COURSES**, 5.

## STATUTES—CONTINUED.

1. **STATUTES—TITLE AND SUBJECTS—SCHOOLS.** The provision of the code of public instruction relating to the acquisition of school sites is germane to and within the title "an act providing for the maintenance of and relating to a general and uniform school system" of the state etc., where the act itself was very general and covered all manner of subjects relating to the public schools. *State ex rel. School District No. 56 v. Superior Court*..... 189
2. **STATUTES—TITLE—SCOPE.** The title, an act extending the powers and jurisdiction of cities into the navigable waters adjacent to their boundaries, sufficiently expresses the purpose of the act to extend the boundaries of the city for all purposes. *Pacific American Fisheries v. Whatcom County*..... 291
3. **STATUTES—TITLE AND SUBJECT.** The object of an act rendering municipal corporations liable to laborers and materialmen if the city fail to take a bond from contractors on public work, is sufficiently disclosed by the title, an act requiring bonds from contractors on public work, conditioned to pay laborers and materialmen. *Hambach v. Ward*..... 351
4. **STATUTES—CONFLICT OF LAWS—EXTRATERRITORIAL FORCE OF FOREIGN LAWS.** Where, under the law of this state, jail breaking was only a misdemeanor at the time the offense was committed in another state, the offense would not be an infamous crime, within the meaning of Rem. & Bal. Code, § 4768, denying the elective franchise to certain citizens, even if jail breaking were a felony in such other state; since the laws of such state could not be given extraterritorial force in opposition to the laws of this state. *State v. Collins*. .... 268
5. **STATUTES—FOREIGN LAWS—PLEADING AND PROOF.** The laws of another state must be pleaded and proved. *State v. Collins*.... 268

## STAY:

Failure to supersede judgment on appeal, see **DIVORCE**, 7.

## STOCK:

Illegal issue of corporate stock, see **BILLS AND NOTES**, 1, 2; **CORPORATIONS**, 1.

Rescission of sale of stock, see **CORPORATIONS**, 2, 3.

Damages for fraud in sale of corporate stock, see **DAMAGES**, 3.

Fraud in sale of mining stock, see **EQUITY**; **FRAUD**.

Taxation of capital stock, see **TAXATION**, 1, 2.

## STOLEN GOODS:

See **RECEIVING STOLEN GOODS**.

## STORAGE:

See **WAREHOUSEMEN**.

**STREET RAILROADS:**

Carriage of passengers, see CARRIERS, 2, 3.

**STREETS:**

See MUNICIPAL CORPORATIONS.

Condemnation for change of grades, see EMINENT DOMAIN, 1, 7-11.

Condemnation for widening street, see EMINENT DOMAIN, 2, 12, 13.

Injury to children from work negligently carried on in city street,  
see NEGLIGENCE, 2, 3.

**SUIT MONEY:**

Pending appeal, see DIVORCE, 3.

**SUMMONS:**

Service of in divorce suit, see DIVORCE, 2.

**SURFACE WATERS:**

See WATERS AND WATER COURSES, 8.

**SURRENDER:**

To corporation of illegal issue of stock, see CORPORATIONS, 1.

**SUSPENSION:**

Of judgment in criminal prosecutions, see CRIMINAL LAW, 7, 8.

**SWEARING:**

False swearing in registration oath, see ELECTIONS, 5-7.

**TAXATION:**

Commencement of action to cancel tax deed, see LIMITATION OF  
ACTIONS, 1.

Levy of city taxes, see MUNICIPAL CORPORATIONS, 2.

Proof of notice of tax sale, see PROCESS, 2.

Tax titles held in trust, see TRUSTS, 1.

1. TAXATION — ASSESSMENT—NATIONAL BANK STOCK—DEDUCTION—  
REAL PROPERTY—WHAT CONSTITUTES—BUILDING INVESTMENT BONDS.  
Business property investment bonds held by a national bank are  
real estate, within the meaning of Rem. & Bal. Code, § 9134, requir-  
ing the deduction from the assessed value of national bank stock  
of the assessed value of the real estate belonging to the bank, where  
such bonds, issued by a trust company in a sum equal to the alleged  
value of a specified tract of land, each represented and conveyed to  
the holder, one of the "units" in the land created by a deed of trust,  
under a scheme devised by the trust company to enable persons to  
invest small amounts in high priced business property, the trust  
deed requiring the trust company to pay over to the bondholders  
certain profits and surplus dividends, together with a share of the  
net income, and finally to sell the property and distribute the pro-

## TAXATION—CONTINUED.

- ceeds among the bondholders, the only interest in the land retained by the trust company being a prospective right to share in the net income and in the surplus in the ultimate sale price above the face value of the bonds; especially in view of the presumption against a legislative intent to authorize double taxation impliedly prohibited by Const., art. 7, § 2, and in view of Rem. & Bal. Code, § 9092, defining real property for the purposes of taxation to include all rights and privileges thereto belonging or in any way appertaining. *Dexter Horton National Bank v. McKenzie*..... 314
2. SAME—REAL ESTATE HELD BY BANK—PRESUMPTIONS. In the absence of any showing, it will be presumed that a national bank legally acquired its real estate the assessed value of which it seeks to have deducted from the assessed value of its capital stock. *Dexter Horton National Bank v. McKenzie*..... 314
3. TAXATION—FORECLOSURE—SALE—NOTICE—DESCRIPTION OF PROPERTY—MINING CLAIMS. Upon a collateral attack of a tax foreclosure sale of mining claims, a notice of sale describing the claims at the R. lode and the C. lode, with the number of acres in each, when the government patents named them as the R. lode and the C. "Fraction," is sufficient, in the absence of a showing that the claims could not be found from the description given. *Old Republic Mining Co. v. Ferry County*..... 600
4. TAXATION—FORECLOSURE PROCEEDINGS—PRESUMPTIONS. The presumption being in favor of the regularity of tax proceedings, an assessment of two mining claims *in solido* instead of in parcels, as required by law, will not be found from the mere fact that the certificate of delinquency was for the total amount. *Old Republic Mining Co. v. Ferry County*..... 600
5. TAXATION—FORECLOSURE PROCEEDINGS—COLLATERAL ATTACK—DEED—EVIDENCE OF REGULARITY. In a collateral attack upon a tax foreclosure sale, the deed is conclusive of the regularity of the proceedings as against mere omissions in the recitals contained in the record, in view of the statute making the deed *prima facie* evidence that the sale was conducted in the manner required by law. *Old Republic Mining Co. v. Ferry County*..... 600
6. SAME—ACTION TO SET ASIDE—CONDITIONS PRECEDENT—TENDER OF TAX—WAIVER. A tender of taxes, made by statute a prerequisite to a suit to set aside a tax sale, cannot be excused by an allegation that the county had proclaimed and stated that any tender on account of taxes for the year in question would be refused; no officer of the county having any authority to make any such waiver. *Old Republic Mining Co. v. Ferry County*..... 600

## TEACHERS:

Home instruction as defense to violation of compulsory attendance law, see SCHOOLS AND SCHOOL DISTRICTS, 5.



**TENANCY IN COMMON:**

Title to property not mentioned in decree, see **DIVORCE**, 5, 6.

**TENDER:**

After commencement of foreclosure, sufficiency, see **CHATTEL MORTGAGES**, 3.

Of tax in action to set aside tax sale, see **TAXATION**, 6.

**TERMINATION:**

Of broker's contract to sell property, see **BROKERS**.

Of unacknowledged lease, see **LANDLORD AND TENANT**, 2.

**TIDE LANDS:**

Filling of tide and swamp lands, see **MUNICIPAL CORPORATIONS**, 13, 17, 29.

**TIME:**

For filing declaration of homestead, see **HOMESTEAD**, 1.

For reliance on promise to make appliance safe, see **MASTER AND SERVANT**, 8.

For proof of nuncupative will, see **WILLS**, 1.

**TITLE:**

By adverse possession, see **ADVERSE POSSESSION**.

Personal liability of agent on breach of covenant, see **PRINCIPAL AND AGENT**.

Removal of cloud, see **QUIETING TITLE**.

Statutes, see **STATUTES**, 1-3.

**TORTS:**

See **FRAUD**; **LIBEL AND SLANDER**; **MALICIOUS PROSECUTION**; **NEGLIGENCE**.

Survival of action for, see **ABATEMENT AND REVIVAL**.

Measure of damages, see **DAMAGES**, 4-9.

Of employers, see **MASTER AND SERVANT**.

Negligent construction of sewer, see **MUNICIPAL CORPORATIONS**, 40.

Malpractice, see **PHYSICIANS AND SURGEONS**, 2.

Agents, see **PRINCIPAL AND AGENT**.

**TOWNS:**

Water supply, extending pipes to property line, see **WATERS AND WATER COURSES**, 9.

**TRACKS:**

Order of railroad commission to build spur track, see **RAILROADS**, 2.

**TRANSFER:**

To corporation of illegal issue of stock, see **CORPORATIONS**, 1.

Of liquor license, see **INTOXICATING LIQUORS**, 2.

**TRIAL:**

See **NEW TRIAL**.

Exceptions or objections for purpose of review, see **APPEAL AND ERROR**, 3-6.

Review of errors as dependent on prejudicial nature of same, see **APPEAL AND ERROR**, 20-24.

Instructions in action for injury to person on track, see **CARRIERS**, 2-4.

Continuance of, see **CONTINUANCE**.

Of criminal prosecution, see **CRIMINAL LAW**.

Instructions in action for slander, see **LIBEL AND SLANDER**, 2.

Instructions in action for personal injury to servant, see **MASTER AND SERVANT**, 16.

Place of trial, see **VENUE**.

1. **TRIAL—PROVINCE OF COURT AND JURY—DIRECTING VERDICT.** Where there is no evidence upon which the jury could rest a verdict, and there is nothing to submit to the jury, it is the duty of the court to so hold. *Brydges v. Cunningham*..... 8
2. **TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.** A requested instruction assuming facts as proven which were for the jury is properly refused. *Harkins v. Veness Lumber Co.*..... 196
3. **TRIAL—SUBMISSION OF ISSUE TO JURY—INJUNCTION—EQUITY.** In an action for damages from flooding land, and for an injunction, it is not error to submit the issue of damages to a jury for an advisory verdict. *Dalton v. Union Gap Irrigation Co.*..... 303

**TROVER AND CONVERSION:**

Conversion of liquor license, see **INTOXICATING LIQUORS**, 2.

**TRUSTS:**

Assignment of agency interest in trust property, see **ASSIGNMENTS**.

1. **TRUSTS—PRINCIPAL AND AGENT—AGENCY WITH INTEREST.** There is an agency with an interest, where a principal takes tax titles, obtained by his agent, under an agreement to divide the profits equally, after return of the money advanced with interest; and the principal holds the title in trust and is liable to an accounting. *Oriental Realty Co. v. Taylor*..... 115
2. **TRUSTS—CONSTRUCTIVE TRUST—SALE OF LAND—EVIDENCE—SUFFICIENCY.** A constructive trust in lands in favor of the plaintiff is established where it appears that plaintiff purchased state lands at public sale and fully performed the contract, but defendants procured the state deed by representing to the commissioner of public lands that a default judgment awarding defendants the right to the property and operating as an assignment of the state contract had become final, when in fact a petition for the vacation of the judgment was pending, and it was finally vacated and the action dis-

**TRUSTS—CONTINUED.**

missed, and there was no consideration for a direction by the plaintiff to allow defendants to purchase the land which constituted the basis for the action. *Parker v. Burwell*..... 386

**VACATION:**

See JUDGMENT, 1.  
Of judgment forfeiting bail bond, see BAIL.  
Of receivership, see CORPORATIONS, 5.  
Of tax sale, see TAXATION, 6.

**VALUE:**

Limits of jurisdiction, see APPEAL AND ERROR, 1.

**VAGRANCY:**

1. VAGRANCY—"FORTUNE TELLING." One who, for a fee, casts horoscopes and professes to tell future events in the life of the sitter, is guilty of fortune telling, within Rem. & Bal. Code, § 2688, providing that every person who receives any compensation for fortune telling is a vagrant; and it is immaterial that his means of telling fortunes was based upon a science or the principles of astrology. *State v. Neitzel* ..... 567

**VENDOR AND PURCHASER:**

Sale of property by owner without agency of broker, see BROKERS.  
Mental capacity to convey property, see INSANE PERSONS, 1.  
Transfer of ownership of personal property, see SALES.  
Creation of constructive trust on sale of lands, see TRUSTS, 2.

1. VENDOR AND PURCHASER—INCUMBRANCES—RESCISSION BY VENDEE—HIGHWAYS. Public roads across a tract of land which are shown to be an injury and not a benefit to the land, decreasing the value \$50 per acre, are incumbrances, and a purchaser is not thereby estopped to rescind the sale on account of knowledge of the roads, where he did not know that they had become public highways by prescription. *M'Whorter v. Forney Brothers & Co*..... 414
2. VENDOR AND PURCHASER—RESCISSION BY VENDEE—NOTICE OF ELECTION. The commencement of an action for cancellation of executory contracts for land is a sufficient notice of an election to rescind, as a release of the contracts could be provided for in the decree. *Angel v. Columbia Canal Co*..... 550
3. SAME—RIGHT TO RESCIND—WAIVER—LACK OF DILIGENCE. One seeking rescission of a contract for fraud must act promptly upon discovering the fraud; and the right to rescind for fraudulent representations as to an abundant water supply is waived, where the purchaser knew, before he signed the contract, of a shortage in the water supply, but took and retained possession for a year before bringing suit. *Angel v. Columbia Canal Co*..... 550

**VENDOR AND PURCHASER—CONTINUED.**

4. **VENDOR AND PURCHASER—BONA FIDE PURCHASERS — NOTICE — LIS PENDENS.** The recording of an original contract for the sale of state lands, and the filing of a *lis pendens* in an action against the purchaser for the recovery of the land, by one claiming the right to purchase from the state, imparts notice of the rights of the original purchaser as against grantees of the plaintiff in the suit. *Parker v. Burwell* ..... 386

**VENUE:**

See DIVORCE, 4.

Criminal prosecutions, see CRIMINAL LAW, 1.

Vacation of order of transfer to another judge, see JUDGMENT, 1.

1. **VENUE—CHANGE—BIAS OF JUDGE — APPLICATION—EFFECT—JURISDICTION.** An application to transfer a cause to another judge upon an affidavit of prejudice, divests the first judge of jurisdiction to try the case on the merits, if the application is timely made. *Garvey v. Skamser* ..... 259
2. **VENUE—BIAS OF JUDGE — AFFIDAVIT OF PREJUDICE — SUFFICIENCY.** An affidavit of prejudice stating that affiant "believes" the judge is prejudiced instead of stating that he "is prejudiced," as required by statute, is sufficient where the statute gives a change of judges where the party or his attorney, "cannot, or believes that he cannot, have a fair and impartial trial." *Garvey v. Skamser*..... 259

**VERDICT:**

Waiver of objections to on appeal, see APPEAL AND ERROR, 13.

Review of discretionary rulings on, see APPEAL AND ERROR, 14.

Review on appeal, see APPEAL AND ERROR, 18.

Inadequate or excessive damages, see DAMAGES, 4-9.

Review of verdict in condemnation proceedings, see EMINENT DOMAIN, 13.

In civil actions, see TRIAL, 1, 3.

**VOTERS:**

False registration, see ELECTIONS, 5-7.

**VOTING:**

Submission of bond issue to vote, see MUNICIPAL CORPORATIONS, 41.

At school election to purchase school grounds, see SCHOOLS AND SCHOOL DISTRICTS, 3.

**WAIVER:**

Error waived in appellate court, see APPEAL AND ERROR, 13.

Of plea of insanity, see CRIMINAL LAW, 8.

Exemption of homestead, see HOMESTEAD, 2.

Of warranty clause in policy, see INSURANCE, 7.

Of lessor's right to liquidated damages, see LANDLORD AND TENANT, 3.

**WAIVER—CONTINUED.**

Of conditions in surety bond, see **PRINCIPAL AND SURETY**, 1, 2.

Of objections to suit against receiver, see **RECEIVERS**.

Breach of contract of sale, see **SALES**, 2.

Tender of tax in suit to set aside tax sale, see **TAXATION**, 6.

Of right to rescind contracts for land, see **VENDOR AND PURCHASER**, 3.

**WAREHOUSEMEN:**

1. **WAREHOUSEMEN—DELIVERY—BREACH OF CONTRACT—LIABILITY.** A warehouseman who loads out wheat, stored under the usual form of warehouse receipt, which was "wet, mouldy and in a growing condition," is liable in damages, where there was no acceptance at the warehouse and no evidence that it was damaged in transit. *Union Elevator & Warehouse Co. v. Farmers' Warehouse Co.*..... 664

**WARRANTS:**

Sufficiency of search warrant to sustain action for malicious prosecution, see **MALICIOUS PROSECUTION**, 1-3.

**WARRANTY:**

By insured, see **INSURANCE**, 5, 7-9.

**WATERS AND WATER COURSES:**

Disobedience of decree awarding water rights, see **CONTEMPT**.

Injury from flooding by surface water, see **MUNICIPAL CORPORATIONS**, 39.

1. **WATERS AND WATER COURSES — APPROPRIATION — PUBLIC LANDS—SCHOOL LANDS—RESERVATIONS IN TERRITORY.** School lands in a territory reserved by the Federal government for the use of the common schools of the future state are public lands of the United States, within the rule that the waters of streams on public lands are subject to appropriation under the acts of Cong. 14 Stat. at L. 253, and 16 Id. 218, granting the right as to all public lands generally. *State ex rel. Olding v. Stampfy*..... 368
2. **WATERS AND WATER COURSES—APPROPRIATION—RIGHT TO OBSTRUCT—DISSEIZIN—ADVERSE POSSESSION.** The right to obstruct the outlet of a lake, acquired by appropriation in 1883, is lost by disseizin and adverse possession, where the dam was removed in 1892, and thereafter the shores of the lake were held in open, exclusive, notorious and adverse possession for more than ten years, and until a new dam was built in 1909, without any obstruction of the lake except by permission in 1907 for four months, and except that once each year during the rainy season, without the knowledge of the owners, a few stones and pieces of wood were thrown into the narrow outlet of the lake (the work requiring about fifteen minutes) and removed in April or May thereafter. *Thomas v. Spencer*..... 433
3. **WATERS AND WATER COURSES—OBSTRUCTION — FLOODING LANDS—LIABILITY OF CITY.** A city has no right to so obstruct the outlet of

## WATERS AND WATER COURSES—CONTINUED.

- a lake for the purposes of a water supply as to raise the water above high water mark and overflow or injure the lands lying above the line of ordinary high water. *Austin v. Bellingham*..... 677
4. SAME—FLOODING LANDS—LIABILITY OF CITY. A city raising the waters of a lake above high water mark is liable to littoral owners for damages resulting from overflow or seepage through and under adjoining soil. *Austin v. Bellingham*..... 677
5. SAME — “BEDS AND SHORES” — STATUTES — “HIGH WATER MARK.” Rem. & Bal. Code, § 8005, giving to cities the right to occupy and use the beds and shores of lakes up to the high water mark does not mean the highest water reached during annual flood periods, but means the upland boundary of tide and shore lands separating soil adapted for use from that which is submerged so long or frequently in ordinary seasons that vegetation will not grow upon it. *Austin v. Bellingham* ..... 677
6. SAME—FLOODING LANDS—MEANDER LINE. In an action to enjoin the obstruction of the outlet of a lake, raising the water above the line of high water mark, the location of the meander line is immaterial. *Austin v. Bellingham*..... 677
7. SAME—ACTION FOR FLOODING—INJUNCTION—JUDGMENT—FORM. A judgment enjoining a city from obstructing the outlet of a lake is inapt where it prohibits the city from in any manner obstructing the “normal” flow, and should recognize the right of the city to raise the waters to the line of ordinary high water. *Austin v. Bellingham* ..... 677
8. WATERS AND WATER COURSES—SURFACE WATERS—DIVERSION—LIABILITY—RAILROAD EMBANKMENT. A railroad company is liable for flooding lands, where by its embankment, it raised and collected the periodical floods of a river and discharged the same through a culvert in an unusual volume and with excessive force upon plaintiff’s lands, which it thereby washed away and injured; the principle that surface water is an outlaw and common enemy not warranting the collection of surface water in a considerable quantity to be turned in concentrated form through a ditch or culvert upon the premises of another. *Rohsnagel v. Northern Pac. R. Co.*..... 243
9. WATERS AND WATER COURSES—WATER COMPANIES—FRANCHISE—SERVICE TO CONSUMERS—COST OF CONNECTIONS. Under a franchise ordinance authorizing a water company to lay its pipes in streets and requiring it to furnish water to consumers at a certain fixed monthly rate, the company must deliver the water to the consumer at his property line, and must therefore defray the expense of extending the line from the main to the property line. *Cleveland v. Malden Water Works Co.*..... 541

## WAYS:

Public ways, see HIGHWAYS, 1.

**WIDOWS:**

Election between testamentary provisions and other rights, see **WILLS**, 2-4.

**WILLS:**

1. **WILLS—PROBATE—NUNCUPATIVE WILLS—TIME FOR PROOF.** Rem. & Bal. Code, § 1331, which provides that no "proof" shall be received of any noncupative will unless offered within six months after speaking the testamentary words, refers to the testimony and not merely to the petition offering the will; and failure to offer the proofs within six months, is not excused by delay in consequence of the several pleas of the next of kin; in view of Rem. & Bal. Code, §§ 1297, 1302, providing that the court may immediately receive the proofs when the will is exhibited. *In re Greenleaf's Estate*.... 478
2. **WILLS—CONSTRUCTION—INTENT—COMMUNITY PROPERTY—ELECTION BY WIDOW—PROPERTY DEVISED—PRESUMPTION.** A will devising all of the testator's real estate, "and all interest therein, community or otherwise" of which he dies seized or to which he shall have the power of disposition by will, in trust to pay the net income to his wife during life or widowhood, does not show any intent to devise the wife's half of the community property, and hence does not put her to an election between her community interest and the provision made for her in the will; in view of the rule that the necessity for an election must appear upon the face of the will itself, and the presumption that the testator intended to dispose of his own property only, in the absence of any designation of specific property. *Herrick v. Miller*..... 456
3. **WILLS—CONSTRUCTION—EXTRINSIC EVIDENCE—ELECTION.** For the purpose of forcing an election, extrinsic evidence is not admissible to establish the intent to dispose of property over which the testator had no testamentary power of disposition. *Herrick v. Miller*.. 456
4. **WILLS—ELECTION—EVIDENCE—MATERIALITY.** Where a widow was not required by a will to make an election between her community interest and the provision made for her in the will, it is immaterial whether her acts in dealing with the estate would have amounted to an election if the will had required it. *Herrick v. Miller*.... 456

**WITNESSES:**

Perjury, see **PERJURY**.

**WORK AND LABOR:**

Liens for work and materials, see **MECHANICS' LIENS**.

1. **WORK AND LABOR—CONTRACTS—EVIDENCE—SUFFICIENCY.** A claim that plaintiff's deceased uncle had agreed to give her the house and lot on which he lived, worth \$20,000, in consideration of her coming west and keeping house for him, she to have no salary or other compensation, is not sustained by the evidence, where it appears that

**WORK AND LABOR—CONTINUED.**

the deceased's letters making such an offer were not acted upon for three years, that meanwhile he made a will disposing of the property, that plaintiff came west when she was not expected by him about a month before his death, and that she did not contest the will, but filed a claim against his estate for her expenses in coming west and for services in attendance upon the deceased, amounting to \$470, which was allowed. *Hennelly v. O'Dea*..... 295

**WRITINGS:**

Parol evidence to vary, see EVIDENCE.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

**WRITS:**

See ATTACHMENT; CERTIORARI; MANDAMUS; PROCESS; QUO WARRANTO.

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